

This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`



THE

AMERICAN STATE REPORTS,

CONTAINING THE

CASES OF GENERAL VALUE AND AUTHORITY

SUBSEQUENT TO THOSE CONTAINED IN THE "AMERICAN DECISIONS" AND THE "AMERICAN REPORTS,"

DECIDED IN THE

COURTS OF LAST RESORT

OF THE SEVERAL STATES.

SELECTED, REPORTED, AND ANNOTATED

BY A. C. FREEMAN,

AND THE ASSOCIATE EDITORS OF THE "AMERICAN DECISIONS."

VOL. XXII.

SAN FRANCISCO:

BANCROFT-WHITNEY COMPANY,

LAW PUBLISHERS AND LAW BOOKSELLERS.

1892.

AMERICAN STATE REPORTS.

VOL. XXII.

SCHEDULE

showing the original volumes of reports in which the cases herein selected and re-reported may be found, and the pages of this volume devoted to each state.

		PAGE.
TEXAS REPORTS.	Vol. 78.	17–91
VERMONT REPORTS	Vol. 62.	92–135
WASHINGTON REPORTS	Vol. 1.	136–174
ARKANSAS REPORTS	Vol. 53.	175–233
CALIFORNIA REPORTS	Vols. 87, 88.	234–344
HOUSTON'S DELAWARE REPORTS . .	Vol. 6.	345–372
COLORADO REPORTS	Vol. 15.	373–443
GEORGIA REPORTS	Vol. 86.	444–503
ILLINOIS REPORTS	Vol. 132.	504–564
INDIANA REPORTS	Vols. 126, 127.	565–672
MICHIGAN REPORTS	Vol. 84.	673–715
MINNESOTA REPORTS	Vol. 45.	716–752
MISSOURI REPORTS	Vol. 102.	753–802
NEW YORK REPORTS	Vol. 126.	803–862
NORTH CAROLINA REPORTS	Vol. 107.	863–924

SCHEDULE

SHOWING IN WHAT VOLUMES OF THIS SERIES THE CASES REPORTED IN THE SEVERAL VOLUMES OF OFFICIAL REPORTS MAY BE FOUND.

State reports are in parentheses, and the numbers of this series in bold-faced figures.

ALABAMA. — (33) **3**; (34) **5**; (35) **7**; (36) **11**; (37) **13**; (38) **16**; (39) **18**.
ARKANSAS. — (48) **3**; (49) **4**; (50) **7**; (51) **14**; (52) **20**; (53) **22**.
CALIFORNIA. — (72) **1**; (73) **2**; (74) **5**; (75) **7**; (76) **9**; (77) **11**; (78, 79) **12**; (80) **13**; (81) **15**; (82) **16**; (83) **17**; (84) **18**; (85) **20**; (86) **21**; (87, 88) **22**.
COLORADO. — (10) **3**; (11) **7**; (12) **13**; (13) **16**; (14) **20**; (15) **22**.
CONNECTICUT. — (54) **1**; (55) **3**; (56) **7**; (57) **14**; (58) **18**; (59) **21**.
DELAWARE. — (5 Houst.) **1**; (6 Houst.) **22**.
FLORIDA. — (22) **1**; (23) **11**; (24) **12**.
GEORGIA. — (76) **2**; (77) **4**; (78) **6**; (79) **11**; (80, 81) **12**; (82) **14**; (83, 84) **20**; (85) **21**; (86) **22**.
ILLINOIS. — (121) **2**; (122) **3**; (123) **5**; (124) **7**; (125) **8**; (126) **9**; (127) **11**; (128) **15**; (129) **16**; (130) **17**; (131) **19**; (132) **22**.
INDIANA. — (112) **2**; (113) **3**; (114) **5**; (115) **7**; (116) **9**; (117, 118) **10**; (119) **12**; (120, 121) **16**; (122) **17**; (123) **18**; (124) **19**; (125) **21**; (126, 127) **22**.
IOWA. — (72) **2**; (73) **5**; (74) **7**; (75) **9**; (76, 77) **14**; (78) **16**; (79) **18**; (80) **20**.
KANSAS. — (37) **1**; (38) **5**; (39) **7**; (40) **10**; (41) **13**; (42) **16**; (43) **19**; (44) **21**.
KENTUCKY. — (83, 84) **4**; (85) **7**; (86) **9**; (87) **12**; (88) **21**.
LOUISIANA. — (39 La. Ann.) **4**; (40 La. Ann.) **8**; (41 La. Ann.) **17**; (42 La. Ann.) **21**.
MAINE. — (79) **1**; (80) **6**; (81) **10**; (82) **17**.
MARYLAND. — (67) **1**; (68) **6**; (69) **9**; (70) **14**; (71) **17**; (72) **20**.
MASSACHUSETTS. — (145) **1**; (146) **4**; (147) **9**; (148) **12**; (149) **14**; (150) **15**; (151) **21**.
MICHIGAN. — (60, 61) **1**; (62) **4**; (63) **6**; (64, 65) **8**; (66, 67) **11**; (68, 69, 75) **13**; (70) **14**; (71, 76) **15**; (72, 73, 74) **16**; (77, 78) **18**; (79) **19**; (80) **20**; (81, 82, 83) **21**; (84) **22**.
MINNESOTA. — (36) **1**; (37) **5**; (38) **8**; (39, 40) **12**; (41) **16**; (42) **18**; (43) **19**; (44) **20**; (45) **22**.
MISSISSIPPI. — (65) **7**; (66) **14**; (67) **19**.
MISSOURI. — (92) **1**; (93) **3**; (94) **4**; (95) **6**; (96) **9**; (97) **10**; (98) **14**; (99) **17**; (100) **18**; (101) **20**; (102) **22**.
MONTANA. — (9) **18**.
NEBRASKA. — (22) **3**; (23, 24) **8**; (25) **13**; (26) **18**; (27) **20**.
NEVADA. — (19) **3**; (20) **19**.
NEW HAMPSHIRE. — (64) **10**; (62) **13**.

NEW JERSEY. — (43 N. J. Eq.) 3; (44 N. J. Eq.) 6; (50 N. J. L.) 7; (51 N. J. L.; 45 N. J. Eq.) 14; (46 N. J. Eq.; 52 N. J. L.) 19.

NEW YORK. — (107) 1; (108) 2; (109) 4; (110) 6; (111) 7; (112) 8; (113) 10; (114) 11; (115) 12; (116, 117) 15; (118, 119) 16; (120) 17; (121) 18; (122) 19; (123) 20; (124, 125) 21; (126) 22.

NORTH CAROLINA. — (97, 98) 2; (99, 100) 6; (101) 9; (102) 11; (103) 14; (104) 17; (105) 18; (106) 19; (107) 22.

OHIO. — (45 Ohio St.) 4; (46 Ohio St.) 15; (47 Ohio St.) 21.

OREGON. — (15) 3; (16) 8; (17) 11; (18) 17; (19) 20.

PENNSYLVANIA. — (115, 116, 117 Pa. St.) 2; (118, 119 Pa. St.) 4; (120, 121 Pa. St.) 6; (122 Pa. St.) 9; (123, 124 Pa. St.) 10; (125 Pa. St.) 11; (126 Pa. St.) 12; (127 Pa. St.) 14; (128, 129 Pa. St.) 15; (130, 131 Pa. St.) 17; (132, 133, 134 Pa. St.) 19; (135, 136 Pa. St.) 20; (137, 138 Pa. St.) 21.

RHODE ISLAND. — (15) 2.

SOUTH CAROLINA. — (26) 4; (27, 28, 29) 13; (30) 14; (31, 32) 17.

TENNESSEE. — (85) 4; (86) 6; (87) 10; (88) 17.

TEXAS. — (68) 2; (69; 24 Tex. App.) 5; (70; 25, 26 Tex. App.) 8; (71) 10; (27 Tex. App.) 11; (72) 13; (73, 74) 15; (75) 16; (76) 18; (77; 28 Tex. App.) 19; (78) 22.

VERMONT. — (60) 6; (61) 15; (62) 22.

VIRGINIA. — (82) 3; (83) 5; (84) 10; (85) 17; (86) 19.

WASHINGTON. — (1) 22.

WEST VIRGINIA. — (29) 6; (30) 8; (31) 13.

WISCONSIN. — (69) 2; (70, 71) 5; (72) 7; (73) 9; (74, 75) 17; (76, 77) 20.

AMERICAN STATE REPORTS.

VOL. XXII.

CASES REPORTED.

NAME.	SUBJECT.	REPORT.	PAGE.
Adams v. Bicknell	*Malicious prosecut'n.*	126 Ind. 210	576
Ah You, In re	*Ordinances*	88 Cal. 99	280
Andrews v. King County	*Taxation*	1 Wash. 46	136
Arthur v. Israel	*Judgment—estoppel.*	15 Col. 147	381
Avery v. Clark	*Vendor and vendee.*	87 Cal. 619	272
Baby, In re	*Judgment—appeal.*	87 Cal. 200	239
Baird v. Shipman	*Agency*	132 Ill. 16	504
Bates v. Rutland	*Mun. corporations.*	62 Vt. 178	95
Beckett v. Cuenin	*Process*	15 Col. 281	399
Benners v. Rhinehart	*Execution*	107 N. C. 705	909
Bennett v. State	*Criminal law*	86 Ga. 401	465
Bexar etc. Ass'n v. Robinson	*Usury*	78 Tex. 163	36
Blythe v. Denver etc. R'y Co.	*Carriers*	15 Col. 333	403
Bowden v. Bland	*Equity*	53 Ark. 53	179
Bristol v. Pearson	*Sale*	107 N. C. 562	900
Brown v. Duncan	*Execution*	132 Ill. 413	545
Brown v. Smith	*Master and servant.*	86 Ga. 274	456
Brown v. Warner	*Receivers*	78 Tex. 543	67
Brumbaugh v. Richcreek	*Fraud. conveyance.*	127 Ind. 240	649
Buffalo Loan etc. Co. v. Knights Templar etc. Ass'n.	*Life insurance*	126 N. Y. 450	839
Burton v. Willin	*Set-off*	6 Houst. 522	363
California Ins. Co. v. Gracey	*Insurance*	15 Col. 70	376
Carden v. Carden	*Attachment.*	107 N. C. 214	876
Carr v. State	*States*	127 Ind. 204	624
Chamberlain v. Dunlop	*Lease*	126 N. Y. 45	807
Chase v. Cartright	*Ex'rs and adm'rs.*	53 Ark. 358	207
Chicago etc. R. R. Co. v. Hines	*Judgments*	132 Ill. 161	515
City of St. Louis v. Davidson	*Mun. corporations.*	102 Mo. 149	764
Cleveland etc. R'y Co. v. Closser	*Carriers*	126 Ind. 348	593
Colorado Iron Works v. Sierra Grande Min. Co.	*Foreign corporat'ns.*	15 Col. 499	433
Conner v. Woodfill	*Trespass*	126 Ind. 85	568

NAME.	SUBJECT.	REPORT.	PAGE.
Corbett v. Littlefield	*Chattel mortgage*	84 Mich. 30	681
Cregan v. Marston	*Master and servant*	126 N. Y. 568	854
Cushman v Somers	*Appeal and error*	62 Vt. 132	92
Davis v. Stout	*Neg. instruments*	126 Ind. 12	565
Deans v. Wilmington etc. R. R. Co.	*Negligence*	107 N. C. 686	902
De Votie v. McGerr	*Husband and wife*	15 Col. 467	426
Donahue v. Meister	*Jury trial*	88 Cal. 121	283
Drew v. Pedlar	*Vendor and vendee*	87 Cal. 443	257
Dunsmoor v. Furstenfeldt	*Attachment*	88 Cal. 522	331
Dutcher v. Hobby	*Mortgage*	86 Ga. 198	444
Earnhart v. Earnhart	*Wills*	127 Ind. 397	652
Eddy v. Harris	*Carriers*	78 Tex. 661	88
Emmel v. Hayes	*Specific perform'nce*	102 Mo. 136	769
Emmons v. City of Lewistown	*Peddler*	132 Ill. 380	540
Evans v. Lobdale	*Husband and wife*	6 Houst. 212	358
Ex parte Spears	*Extradition*	88 Cal. 640	341
Fake v. Addicks	*Animals*	45 Minn. 37	716
Farwell v. St. Paul Trust Co.	*Neg. instruments*	45 Minn. 495	742
First National Bank v. Devenish	*Banks and banking*	15 Col. 229	394
Flickinger v. Shaw	*License*	87 Cal. 126	234
Follette v. United States etc. Ass'n.	*Insurance*	107 N. C. 240	878
Furnish v. Missouri P. R'y Co.	*Carriers*	102 Mo. 438	781
Furnish v. Missouri P. R'y Co.	*Husband and wife*	102 Mo. 669	800
Gainesville etc. R'y Co. v. Hall	*Eminent domain*	78 Tex. 169	42
Georgia R. R. etc. Co. v. Dougherty.	*Carriers*	86 Ga. 744	499
Georgia R. R. etc. Co. v. Eskew	*Carriers*	86 Ga. 641	490
Gilbert v. How	*Agency*	45 Minn. 121	724
Greenwaldt v. May	*Judgment*	127 Ind. 511	660
Griffith v. Langsdale	*Attachment*	53 Ark. 71	182
Grimshaw v. Belcher	*License*	88 Cal. 217	298
Griswold v. Hicks	*Judgments*	132 Ill. 494	549
Hahlo v. Mayer	*Partnership*	102 Mo. 93	753
Harbor Commissioners v. Redwood Co.	*Penalty*	88 Cal. 491	321
Hardy v. Williamson	*Libel and slander*	86 Ga. 551	479
Harvey v. State	*Criminal law*	53 Ark. 425	229
Hatch's Estate	*Homestead*	62 Vt. 300	109
Hawes v. Blackwell	*Banks and banking*	107 N. C. 196	870
Hawthorne v. Siegel	*Trespass*	88 Cal. 159	291
Hecht v. Skaggs	*Surety*	53 Ark. 291	192
Hickman v. Hickman	*Marr'ge and divorce*	1 Wash. 257	148
Hogle v. Mott	*Process*	62 Vt. 255	106
Holloway v. Holloway	*Homesteads*	86 Ga. 576	484
Horan v. Strachan	*Shipping*	86 Ga. 408	471
Hovey v. State	*Mandamus*	127 Ind. 588	663
Huffman v. Mulkey	*Vendor and vendee*	78 Tex. 556	71
Huguley v. Lanier	*Wills*	86 Ga. 636	487

NAME.	SUBJECT.	REPORT.	PAGE.
Ilwaco R'y & Nav. Co. v. Hedrick	*Railroads*	1 Wash. 446	169
In re Ah You	*Ordinances*	68 Cal. 99	280
In re Baby	*Judgment—appeal*	67 Cal. 200	239
In re McManus	*Execution*	67 Cal. 292	250
International etc. R'y Co. v. Kernan	*Master and servant*	78 Tex. 294	52
Jenkins v. Wilkinson	*Neg. instruments*	107 N. C. 707	911
Johnson v. Archibald	*Boundaries*	78 Tex. 96	27
Jones v. St. Louis etc. R'y Co.	*Evidence*	53 Ark. 27	175
Kalamazoo H. & B. Co. v. Scotama	*Carriers*	84 Mich. 194	693
Kessinger v. Wilson	*Homestead*	53 Ark. 400	220
Kingman v. Denison	*Sale*	84 Mich. 698	711
Kingman v. Paulson	*Judgment*	126 Ind. 507	611
Kirkpatrick v. Clark	*Ejectment*	132 Ill. 342	531
Knoop v. Kelsey	*Estoppel*	102 Mo. 291	777
Lahay v. City National Bank	*Fraud*	15 Col. 339	407
Louisville etc. R'y Co. v. Nitsche	*Railroads*	126 Ind. 229	582
Magoffin v. Missouri P. R'y Co.	*Carriers*	102 Mo. 540	798
Marston v. Williams	*Mortgage*	45 Minn. 116	719
Martin v. Morgan	*Vendor and vendee*	87 Cal. 203	240
Mason v. Vestal	*Fraud. conveyance*	88 Cal. 396	310
McCarty v. State	*Criminal law*	1 Wash. 377	152
McDuff v. Detroit Eve. Jour. Co.	*Libel*	84 Mich. 1	673
McFeters v. Pierson	*Mines*	15 Col. 201	388
McLaughlin v. Etchison	*Judgment*	127 Ind. 474	658
McManus, In re	*Execution*	87 Cal. 292	250
McVeety v. St. Paul etc. R'y Co.	*Carriers*	45 Minn. 268	728
Millard v. Truax	*Assault*	84 Mich. 517	705
Miller v. Highland Ditch Co.	*Joint liability*	87 Cal. 430	254
Mobile etc. R. R. Co. v. People	*Railroads*	132 Ill. 559	556
Moore v. Long Beach Development Co.	*Innkeepers*	87 Cal. 483	265
Moore v. Williams	*Judgments*	132 Ill. 589	563
Morris v. Missouri Pacific R'y Co.	*Actions*	78 Tex. 17	17
Mullin v. People	*Contempt*	15 Col. 437	414
Murphy v. Mayor etc. of Wilmington	*Mun. corporations*	6 Houst. 108	345
Nashville etc. R'y Co. v. Heggie	*Carriers*	86 Ga. 210	453
National Bank v. Union Ins. Co.	*Fire insurance*	88 Cal. 497	324
Nelson v. Galveston etc. R'y Co.	*Negligence*	78 Tex. 621	81
Nordholt v. Nordholt	*Trusts*	87 Cal. 552	268
Norfolk National Bank v. Griffin	*Neg. instruments*	107 N. C. 173	868
Olson v. St. Paul etc. R. R. Co.	*Carriers*	45 Minn. 536	749
Oregon R'y & Nav. Co. v. Smalley	*Railroads*	1 Wash. 206	143
Parker v. Chase	*Chattel mortgage*	62 Vt. 206	99
Peers v. McLaughlin	*Mortgage*	88 Cal. 294	306
Phillips v. Herndon	*Pleading*	78 Tex. 378	59

NAME.	SUBJECT.	REPORT.	PAGE.
Posnett v. Marble	*Libel and slander*	62 Vt. 481	126
Pratt v. Burhans	*Sale*	84 Mich. 487	703
Preble v. Abrahams	*Vendor and vendee*	88 Cal. 245	301
Ramsey v. Glenny	*Adverse possession*	45 Minn. 401	736
Rhodes v. Newhall	*Bill of lading*	126 N. Y. 574	859
Richmond etc. R. R. Co. v. Benson	*Carriers*	86 Ga. 203	446
Ritchie v. Griffiths	*Deed*	1 Wash. 429	155
Robinson v. Baskins	*Judgment*	53 Ark. 330	202
Roodhouse v. Roodhouse	*Guardian and ward*	132 Ill. 360	539
Roseville Alta Min. Co. v. Iowa Gulch Min. Co.	*Fixtures*	15 Col. 29	373
Rudd v. Robinson	*Corporations*	126 N. Y. 113	816
Savannah St. R. R. Co. v. Bryan	*Master and servant*	86 Ga. 312	464
Shipman v. Bank of State of New York	*Banks*	126 N. Y. 318	821
Simpson v. Dufour	*Carriers*	126 Ind. 322	590
Skoglund v. Minneapolis St. R'y Co.	*Judgment*	45 Minn. 330	733
Slater v. Hass	*Mining partnership*	15 Col. 574	440
Smith v. Olmstead	*Wills*	88 Cal. 582	336
Sowles v. Hall	*Mortgage*	62 Vt. 247	101
Spears, Ex parte	*Extradition*	88 Cal. 640	341
Speet v. Speet	*Mortgage*	88 Cal. 437	314
St. Louis etc. R'y Co. v. Bennett	*Master and servant*	53 Ark. 208	187
St. Louis etc. R'y Co. v. McKinsey	*Railroads*	78 Tex. 298	54
St. Louis etc. R'y Co. v. Ramsey	*Waters*	53 Ark. 314	195
Staley v. Leomans	*Taxation*	53 Ark. 428	231
State v. Engle	*Mandamus*	127 Ind. 457	655
State v. Jacobs	*Criminal law*	107 N. C. 772	912
State v. Laclede Gaslight Co.	*Mun. corporations*	102 Mo. 472	789
State v. Webber	*House of ill-fame*	107 N. C. 962	920
State National Bank v. Neel	*Judicial sale*	53 Ark. 110	185
Stewart v. Lohr	*Courts*	1 Wash. 341	150
Taylor v. Sullivan	*Office and officer*	45 Minn. 309	729
Texas etc. R'y Co. v. Adams	*Receivers*	78 Tex. 372	56
Tillman v. Heller	*Fraud. conveyances*	78 Tex. 597	77
Timlin v. Standard Oil Co.	*Nuisance*	126 N. Y. 514	845
Townsend v. Bogert	*Equity*	126 N. Y. 370	835
Travelers Ins. Co. v. McCarthy	*Accident insurance*	15 Col. 351	410
Trible v. Nichols	*Usury*	53 Ark. 271	190
Tufts v. Griffin	*Sale*	107 N. C. 47	863
Van Buren v. Wells	*Mun. corporations*	53 Ark. 368	214
Wayne County Savings Bank v. Stockwell	*Highway*	84 Mich. 586	706
Watters v. Wagley	*Deed*	53 Ark. 509	232
Watts v. Sweeney	*Mechanic's lien*	127 Ind. 116	615
Webb v. Laird	*Mills*	62 Vt. 448	121
Wells v. Bower	*Execution*	126 Ind. 115	570

NAME.	SUBJECT.	REPORT.	PAGE.
Western Wooden-ware Association v. Starkey	*Contract*	84 Mich. 76	686
Williamson v. Johnson	*Gift*	62 Vt. 378	117
Winter v. McMillan	*Agency*	87 Cal. 256	243
Wooden v. Western New York and Pennsylvania R. R. Co.	*Railroads*	126 N. Y. 10	803
Woodward v. Blue	*Parent and child*	107 N. C. 407	897
Woolverton v. Taylor	*Corporations*	132 Ill. 197	521
Young v. Western Union Tel. Co.	*Telegraph company*	107 N. C. 370	883

AMERICAN STATE REPORTS.

VOL. XXII.

CASES

IN THE

SUPREME COURT

OF

TEXAS.

MORRIS *v.* MISSOURI PACIFIC RAILWAY COMPANY.

[78 TEXAS, 17.]

ACTIONS, LOCAL AND TRANSITORY. — Where a cause of action may arise anywhere, an action thereon is transitory, and when it could have arisen in one place only, the action is local. Hence an action of trespass to the person or for the conversion of goods is transitory, while an action for flooding particular lands is local.

LOCAL ACTIONS CONSIST, GENERALLY, of those instituted for the recovery of real estate or for injuries thereto, or for easements.

LOCAL ACTION — TRESPASS — JURISDICTION. — An action for trespass to land situated in one country or state cannot be maintained in the courts of another state.

ACTIONS, LOCAL AND TRANSITORY, BETWEEN NON-RESIDENTS — JURISDICTION. — Where a cause of action between non-residents is partly local and partly transitory, and arose beyond the limits of the state, the court may refuse to entertain jurisdiction, as jurisdiction is entertained in such cases only upon principles of comity, and not as matter of right.

Hare, Edmundson, and Hare, for the appellant.

R. C. Foster and A. E. Wilkinson, for the appellee.

HOBBY, J. The plaintiff in the court below, who is the appellant here, instituted this action for the recovery of damages for injuries to certain real property in the Choctaw nation of the Indian Territory, which he alleged was caused by defendant's negligence in permitting fire to be communicated thereto. Plaintiff's rights in the property grow out of the fact that he had acquired, by marriage with an Indian woman, membership in the said Choctaw tribe. Plaintiff resided in said nation, and defendant is a Missouri corporation having an office and agent in the county where this suit was brought.

The allegations were, that under the laws of the Choctaw nation now in force, and in force at the time of said fire, plaintiff, by marrying into said tribe, became a member thereof, without relinquishing his rights as a citizen of the United States; that under the laws of said nation marriage with a member of said tribe conferred upon the person so marrying all rights possessed and enjoyed by other members thereof; that under the laws of said nation and treaties with the United States no member of said tribe, or other person, can own lands lying in said Choctaw nation, but under the laws of said nation any member thereof, whether native born or acquiring membership by marriage, might fence and inclose all the lands he might desire, and all lands so fenced and inclosed immediately become subject to the exclusive beneficial possession and occupancy of the person so inclosing, with privilege to transfer the possession and occupancy by sale, gift, or devise; that the lands mentioned were fenced and inclosed as a pasture by plaintiff after his adoption into said tribe, and that by so fencing, inclosing, and occupying the same he became entitled to the exclusive beneficial occupancy and enjoyment thereof.

He claimed damages against defendant in the sum of about $6,000 for injury by fire from defective engine in the Choctaw nation, to property of which plaintiff was, under the laws of said nation, entitled to the exclusive beneficial use and possession; the damage by fire being as follows: 1,000 acres of growing grass of the value of $5 per acre, the grass on the ground being worth $2 per acre, and the damage to said grass for future use, during the time that plaintiff would have been entitled to the same, being $3 per acre; posts destroyed, $17.20; amount paid hands for fighting the fire, $21; amount paid for gathering cattle that had been scattered by the fire, $501; in the aggregate, $5,539.20.

Defendant interposed a demurrer in the nature of a plea to the jurisdiction, on the ground that the cause of action was local, and not within the jurisdiction of the Texas courts; and second, that the enforcement of the rights of plaintiff as a member of the Choctaw tribe of Indians was within the exclusive jurisdiction of the federal government, and not cognizable in the courts of Texas. This demurrer being sustained, plaintiff has assigned the ruling as error, and asserts, in substance, the following propositions: —

"That a suit lies in the Texas courts in favor of a non-

resident against a non-resident corporation having an office and agent in the county of the suit for injury to lands beyond the limits of the state; that damages resulting from negligent burning of plaintiff's premises are transitory, and actionable here, so far as they embrace only expenses, as of gathering cattle or fighting fire, caused by the injury to the premises, as distinguished from injury to the premises; that members of the Indian tribes resident in the Indian Territory can sue in the courts of Texas for redress of injuries to property rights enjoyed by them as members of such tribes."

Each of these propositions is controverted by appellee.

If the action brought by the plaintiff is of that class known as local actions, the well-established doctrine is, that it must be brought in the county where the right of action accrued. The briefest as well as the clearest distinction between this class and transitory actions is thus stated: "If the cause of action be one that might have arisen anywhere, then it is transitory. If it could only have arisen in one place, then it is local. As, for example, an action of trespass to the person or for the conversion of goods is transitory. But an action for flooding particular lands is local, because the land can only be flooded where it is situated. For the most part, the local actions consist of those instituted for the recovery of real estate or for injuries thereto, or for easements": Cooley on Torts, 471.

That actions for trespass on lands in a foreign country cannot be sustained is settled law in England and in this country: Cooley on Torts, 471.

The decision of Chief Justice Marshall in *Livingston* v. *Jefferson*, 1 Brock. 203, upon this question appears to have been followed in numerous cases: See Cooley on Torts, 471, note 5. The action was for damage for trespass upon land charged to have been committed in Louisiana, brought in Virginia. It was held that it could not be maintained, because the damage and the act causing it occurred beyond the jurisdiction of the court in which the suit was brought. Such is the case before us.

The only case to which we have been referred as questioning the authority of the foregoing doctrine is that of *Armendias* v. *Stillman*, 54 Tex. 627. While there may be expressions in the opinion in that case which would give force to the contention of appellant that it is decisive of this case, we do not understand it to decide the question here raised. There is an

entire absence of analogy between the case last cited and the present in several essential features.

In the former case, the question was rather one of venue than jurisdiction. The parties were residents of Cameron County, in which the suit was brought. In the present case, the plaintiff is a resident and member of the Choctaw nation, in the Indian Territory (having, under the laws of the nation, become a member of the tribe by reason of his marriage with an Indian woman), and the defendant is a foreign corporation; both, therefore, being non-residents.

In the case cited, the act resulting in the injury to the land was committed by the defendant in Cameron County, within the court's jurisdiction. In accord with this decision will be found *Rundle* v. *Delaware etc. Canal Co.*, 1 Wall. Jr. 275, where it was held that if a wrongful act committed in one state injure real property in another, action for damages may be brought in the former. So in *Thayer* v. *Brooks*, 17 Ohio St. 489, 49 Am. Dec. 474, an action was sustained for diversion of water in Pennsylvania resulting in injury to land in Ohio.

In the case under discussion, the alleged negligence causing the damage was committed beyond the limits of the state. In *Armendiaz* v. *Stillman*, 54 Tex. 627, the suit could have been brought alone under the eighth section of article 1198, regulating the venue of suits, which authorized a suit in any county where a trespass was committed affording a cause of action for damages. In that case, the fact that the plaintiff was a citizen of Texas, and, as such, was guaranteed a remedy through the agency of the judicial tribunals of his state by organic law, was an important reason against the interpretation of article 1198 as denying him a remedy for an injury done him in this state with respect to his property.

And the legislative department, in affording this protection to the citizen by statutory provisions as to venue, would not be restricted by the technical rules of the common law distinguishing between transitory and local actions. But the statute applies to such causes of action, necessarily, as arise within the territory legislated for, and cannot be construed as having any reference to resident citizens of a foreign country or state, or to any cause of action arising in such state or country. Hence it is that *Armendiaz* v. *Stillman*, 54 Tex. 627, cannot, we think, have any application to the case disclosed by the record before us.

It is claimed that if the injury to the land was a local action, still, under plaintiff's allegation to the effect that his fence was destroyed and a large number of his cattle scattered, etc., subjecting him to expense in gathering them, the action would be transitory, and therefore the court would take jurisdiction. We do not think the facts alleged show the action to be transitory. But if so, it has been held in such actions, where the parties were non-residents and the cause of action originated beyond the limits of the state, these facts would justify the court in refusing to entertain jurisdiction: *Great Western R'y Co.* v. *Miller*, 19 Mich. 305. Jurisdiction is entertained in such cases only upon principles of comity, and not as a matter of right: *Gardner* v. *Thomas*, 14 Johns. 136; 7 Am. Dec. 445; Wells on Jurisdiction, sec. 115.

In the present case there are obvious reasons against the exercise and extension of this comity in the assumption of jurisdiction of a suit by a member of the Choctaw nation against a non-resident corporation for damages inflicted as alleged in the Indian Territory.

From an examination of the United States Statutes at Large, volume 7, page 333, it appears that a treaty of friendship, cession, and limits was entered into with that nation by the United States on the 15th of September, 1830, at Dancing Rabbit Creek. The lands now occupied by them were then acquired, and are held in common by the tribe, each member having an equal undivided interest, and has a complete right of possession and enjoyment. Members only of the tribe can acquire rights in these lands; and by section 2116, United States Revised Statutes, they cannot be alienated. Plaintiff's right was acquired by virtue of his marriage into the tribe, under the treaty of April 28, 1886, by which he became a member. By the Revised Statutes of the United States, article 463, the commissioner of Indian affairs is invested with the power, under the direction of the Interior Department, over, and has entire management of, all Indian affairs, and of all matters arising out of Indian relations.

Whether the treaty and statutes cited would have the effect to vest exclusive jurisdiction in the federal government in a case like the present, or would exclude the exercise of jurisdiction by the state courts, it is not necessary to determine. But we think they sufficiently indicate the impolicy of entertaining jurisdiction of this suit upon principles of comity, even if any part of the act resulting in injury to the land in the

Indian Territory could be so separated from it as to afford an independent, distinct cause of action, and possess also the characteristics of a transitory action.

For the reasons given, we think the judgment should be affirmed.

ACTIONS, WHEN LOCAL AND WHEN TRANSITORY. — Perhaps the best distinction to be found between local and transitory actions is, that "if the cause of action is one that might have arisen anywhere, then it is transitory; but if it could only have arisen in one place, then it is local; and for the most part, actions which are local are those brought for the recovery of real estate or for injuries thereto, or for easements": Cooley on Torts, 2d ed., 451.

The common-law test of local or transitory actions is the subject-matter to which the injury is done, and not the subject causing the injury. Therefore injuries to persons or personal property are transitory: *Mason* v. *Warner*, 31 Mo. 508, in which the court said: "Actions are either local or transitory. They are said to be transitory where the transactions on which they are founded might have taken place anywhere, but are local when their cause is in its nature necessarily local. The distinction exists in the nature of the subject of the injury complained of, and not in the means in which, or the place at which, the injury was effected. My horse or my steamboat is the subject of injury as well in one county as another; as well in one state as another; but this cannot be affirmed of my land, which is immovable. If an agister of cattle open a pit in his field, and negligently leave it open, whereby my horse at pasture is permitted to fall into it and is killed, the means and place of injury are local, but the subject of injury, the horse, is transitory, and capable of injury as well at one place as another. But if my horse trespass upon the agister's field, break the close, and tread down and eat his grass, here the means of injury, the horse, is movable, transitory; but the subject of the injury, the realty, is immovable, local, and therefore not capable of being injured at any other place." In general, actions founded on contract are transitory, although made and even stipulated to be performed out of the state; while actions founded upon privity of estate in land are local, and lie only in the state where the land is: *White* v. *Sanborn*, 6 N. H. 221; *Henwood* v. *Cheeseman*, 3. Serg. & R. 500; *Lienow* v. *Ellis*, 6 Mass. 331.

A local action must, of course, be brought in that state or county which claims and exercises jurisdiction over the place which gives rise to the action: *Hathorne* v. *Haines*, 1 Me. 238; although an action local in its nature may be maintained in the proper state court against a national bank in a county or city other than that in which it is established. In *Crocker* v. *Marine Nat. Bank*, 101 Mass. 240, 3 Am. Rep. 336, it is held, however, that the action must be brought in the city or county where the bank is situated: *Casey* v. *Adams*, 102 U. S. 66. It seems that a local and a transitory cause of action cannot be united. Thus one who seeks to rescind a contract relating to an exchange of real estate in the county where the land is, against parties residing in another county, cannot, after they have been served with summons and have appeared, amend his complaint so as to include a second cause of action for a breach of a covenant of warranty, and thus blend a local with a transitory cause of action. He is confined to the first cause of action: *Neal* v. *Reynolds*, 38 Kan. 432.

The common-law distinctions as to what constitutes an action local or transitory have been so entirely obliterated by the statutes of the different states relating to venue, and providing where different actions shall be commenced, that no general rule can be announced as to what makes an action local or transitory beyond that already given. It only remains to enumerate the adjudications which hold an action to be local or transitory under the provisions of the several statutes of the different states; and first, then, as to those actions which have been decided to be local.

In relation to actions against public officers for official acts it has been decided in Michigan and in Kansas that the suit must be brought in the county where the act is performed, and not elsewhere: *Clay* v. *Hoysradt*, 8 Kan. 74; *Graham* v. *Smith*, 62 Mich. 147; while in other states it is maintained that the action must be brought in the county, or if the act was performed in another state, then in the state, where the officer qualified: *Foster* v. *Wade*, 4 Bush, 629; *Bank of Kentucky* v. *Harrison*, 1 Bush, 384; *Wilson* v. *Rich*, 5 N. H. 454. A suit against a township cannot be maintained in any other county than the one of which it forms a part: *Pack* v. *Township of Greenbush*, 62 Mich. 122; and an action against a public officer, in his personal capacity, must be brought in the parish of his residence, and cannot be brought, indifferently, in either of the parishes composing the district of his office: *State* v. *Steele*, 33 La. Ann. 910. An action to recover damages for overflowing a mill is local, and must be commenced in the state where the property is situated: *Howard* v. *Ingersoll*, 17 Ala. 780. So an action for flooding land is local, and must be brought in the place where the lands lie: *Exchus* v. *Trustees*, 17 Ill. 534. These cases are decided upon the same principle announced in *City of Marysville* v. *North Bloomfield etc. Mining Co.*, 66 Cal. 343; namely, that an action in relation to a nuisance which causes injury to land must be tried in the place where the land is situated. So an action for injuries to a barge, from the overflow of a canal, is local, and not transitory: *Moyer* v. *Chesapeake etc. Canal Co.*, 12 Phila. 400. An action to recover damages for willfully burning corn, trees, and fences in a certain field is local, and must be brought in the county where the land lies: *Nashville etc. R'y Co.* v. *Weaks*, 13 Lea, 148. Trespass *quare clausum fregit* is a local action, and the land upon which it is committed fixes the county in which the action should be brought: *Roach* v. *Damron*, 2 Humph. 425. An action for obstructing a private way or highway is local, and must be brought in the county where the road is: *Crook* v. *Pitcher*, 61 Md. 510. An action to condemn lands for a public use under the right of eminent domain is local, and must be commenced in the county where the land is situated: *California etc. R. R. Co.* v. *Southern Pacific R. R. Co.*, 65 Cal. 394; 65 Cal. 409. An action to enforce the specific performance of an agreement to convey land must be commenced in the county where the land is located: *Parker* v. *McAllister*, 14 Ind. 12; but a suit to enforce vendor's lien must be brought in the county where the vendee resides: *Coffee* v. *Haynes*, 24 Tex. 190. An action to collect a drainage assessment must be brought in the county where the land assessed is situated, although the party against whom the assessment is made resides in another county: *Dowden* v. *State*, 106 Ind. 157. Where a prosecution is commenced by an individual, the first step is the affidavit upon which the warrant of arrest issues, and an action for malicious prosecution for such arrest must be brought in the county where the prosecution was commenced and where the defendant resided, and not in the county where the arrest was made: *Hubbard* v. *Lord*, 59 Tex. 384. An action of covenant founded upon privity of estate in land is local, and

must be brought where the land lies: *White* v. *Sanborn*, 6 N. H. 221. An action of replevin is local, and must be commenced in the place where the goods are taken and attached: *Robinson* v. *Mead*, 7 Mass. 353. An action of debt on a judgment of record is local, and must be brought in the county where the record is: *Smith* v. *Clark*, 1 Ark. 63; *Barnes* v. *Kenyon*, 2 Johns. Cas. 381.

Under statutes providing that actions for the determination of a right or interest in land must be tried in the county where the land is situated, an action for the reformation of a contract for the sale of land must be brought in the county where it is located: *Franklin* v. *Dutton*, 79 Cal. 605. And so must an action to have a deed absolute on its face declared to be a mortgage, and to redeem therefrom: *Baker* v. *Fireman's Fund Ins. Co.*, 73 Cal. 182. And so must an action against an executor and devisees to subject real estate to the payment of debts of the ancestor, and to vacate deeds made by the devisees to third persons: *Bacot* v. *Lowndes*, 24 S. C. 392. Such statutes, however, confer a mere personal privilege, which may be waived by submitting to the jurisdiction of the court of some other county: *De la Vega* v. *League*, 64 Tex. 205. An action against the bail upon a forfeited recognizance must be brought in the county where the defendants, or one of them, resides: *State* v. *Vanvalkenburg*, 15 Ind. 185.

Generally speaking, injuries to personal property and to personal rights are of a transitory nature, and an action to recover may be brought wherever the defendant may be found and served: *Glen* v. *Hodges*, 9 Johns. 67; *Shaver* v. *White*, 6 Munf. 110; 8 Am. Dec. 730; *Genin* v. *Grier*, 10 Ohio, 210. Hence an action for injury to the person, done beyond the territorial limits of the state, is transitory, and may be maintained in the courts of another state: *Smith* v. *Bull*, 17 Wend. 323; *Hale* v. *Lawrence*, 21 N. J. L. 714; 47 Am. Dec. 190. This rule applies where an injury is received while riding as a passenger on a railroad train: *Ackerson* v. *Erie R'y Co.*, 31 N. J. L. 309. In such case the action may be brought in any county where the company has an office or an agency: *Toppins* v. *East Tennessee etc. R. R. Co.*, 5 Lea, 600; or where the accident happened, notwithstanding the non-residence of the party injured or killed, and of the plaintiff: *Chesapeake etc. R. R. Co.* v. *Higgins*, 85 Tenn. 620. So an action against a railroad company for negligently killing stock is transitory, and not local: *Illinois Cent. R. R. Co.* v. *Swearingen*, 33 Ill. 289. So an action will lie in one state for unlawful discrimination in transportation practiced in another state: *McDuffee* v. *Portland etc. R. R. Co.*, 52 N. H. 430; 13 Am. Rep. 72.

In case of a foreign corporation doing business within a state, an action against it may be tried in any county designated in the complaint: *Thomas* v. *Placerville etc. Min. Co.*, 65 Cal. 600.

Trover is a transitory action, and an action for the conversion of timber is not made local by being brought against the original trespasser who cut the trees: *Greeley* v. *Stilson*, 27 Mich. 152. So trover may be brought in one state for timber unlawfully cut and converted in another: *Tyson* v. *McGuineas*, 25 Wis. 656. So where a person wrongfully removes sand from land in one state and transports it to another state, where he converts it to his own use, the right of action is transitory, and suit may be brought for the value of the sand in the state to which it was transported: *McGonigle* v. *Atchison*, 33 Kan. 726. In *Powell* v. *Smith*, 2 Watts, 126, it was held that the right of property in a chattel which has become such by severance from the freehold cannot be adjudicated in a transitory action. Hence an action of replevin

which is transitory will not lie. Replevin is also decided to be a transitory action in *Copple* v. *Lee*, 78 Ind. 230, in such sense that an action before a justice may be brought either in the township in which the property was taken, or in which it is detained, or that in which the defendant resides: *Cook* v. *Gibson*, 21 Ind. 303.

An action to recover damages for unlawfully entering upon land, and destroying crops or felling timber thereon, need not be brought in the county where the land lies, but may be brought in the county where the defendant resides or may be summoned: *Duncan* v. *Yordy*, 27 Kan. 348; *Powell* v. *Cheshire*, 70 Ga. 357; 48 Am. Rep. 572. *Assumpsit* will lie in one state for the use and occupation of land in another state, such action being founded on privity of contract, and not on privity of estate: *Henwood* v. *Cheeseman*, 3 Serg. & R. 500; *New York* v. *Dawson*, 2 Johns. Cas. 335.

A civil action for an assault and battery may be commenced in any county in which the defendant may be summoned: *McAnarney* v. *Caughenaur*, 34 Kan. 621. Such action may be maintained in one state, although the cause of action arose in another state: *Watts* v. *Thomas*, 2 Bibb, 458.

An action can be maintained in the courts of one state to recover for injury to a building standing on land in another state, where the building was placed with the right of removal: *Laird* v. *Railroad*, 62 N. H. 254; 13 Am. St. Rep. 564. So a tent temporarily erected on land with the right of removal is a mere chattel, and trespass against a third person for the injury to the tent is transitory, and may be brought in the county in which either of the parties resides: *Ford* v. *Burleigh*, 62 N. H. 388. An action of trespass for injury to land in one state, occasioned by diversion of water, may be maintained in that state, although the act which occasioned the diversion may have been committed in another state: *Thayer* v. *Brooks*, 17 Ohio, 489; 49 Am. Dec. 474. So an action for injury done to real property which is situated in one county may be maintained in the county where the trespasser lives or may be found: *Sumner* v. *Finegan*, 15 Mass. 280.

An action against a town, to recover for injuries caused by defects in the highway, which the town is obliged to keep in repair, is transitory, and may be brought in the county where the plaintiff resides: *Titus* v. *Inhabitants of Frankfort*, 15 Me. 89; or in any county within the state: *Raymond* v. *City of Lowell*, 6 Cush. 524; 53 Am. Dec. 57; and need not be brought in the county where the injury is sustained: *Hunt* v. *Town of Pownal*, 9 Vt. 410.

An action for breach of covenant of warranty in a deed is transitory, and may be maintained in the state where the grantor resides, although the land is situated in another state: *Tillotson* v. *Prichard*, 60 Vt. 94; 6 Am. St. Rep. 95; *Oliver* v. *Love*, 59 Miss. 320; *Phelps* v. *Decker*, 10 Mass. 267; or the action may be maintained in another county than that in which the land lies: *Busch* v. *Nester*, 62 Mich. 381.

Where, by the law of the place where a wagering contract is executed, the party losing may maintain an action for the money paid, such action is transitory, and may be brought in any court which obtains jurisdiction of the parties: *Flanagan* v. *Packard*, 41 Vt. 561.

An action of debt on a foreign judgment, where the plaintiff is not a citizen of the state, may be maintained in any county in the state: *Mitchell* v. *Osgood*, 4 Me. 124. So an action of debt for an escape is a transitory action, and the venue may be laid in any county within the state: *Jones* v. *Pemberton*, 7 N. J. L. 350. An action of covenant for rent reserved in a lease, brought by the landlord against the assignee of the tenant, although local at

common law, is transitory in Vermont under the statute: *University of Vermont* v. *Joslyn*, 21 Vt. 52.

An action for injury to a steamboat belonging to a resident of the state, while navigating the Mississippi River beyond the waters of the state, caused by obstructions unlawfully placed in the bed of the river, is transitory, and may be maintained in the courts of the state where the owner of the boat resides: *Mason* v. *Warner*, 31 Mo. 508. So an action to recover for an act preventing the plaintiff from navigating the waters lying between two states is transitory, and may be brought in either: *Gibbons* v. *Ogden*, 6 N. J. L. 285.

An action by the grantor in a deed absolute on its face, to have it declared a mortgage or a trust, may be brought in the county where the grantee resides, although the land lies in another county: *Vandever* v. *Freeman*, 20 Tex. 333; 70 Am. Dec. 391; *Lawrence* v. *Du Bois*, 16 W. Va. 443; *Le Breton* v. *Superior Court*, 66 Cal. 27.

A suit by a purchaser of land for compensation for a deficiency in the quantity sold, and paid for by mistake, is transitory, and may be maintained in the court where the grantor is served with process: *Williams* v. *Burnett*, 6 T. B. Mon. 322.

An action to have a conveyance of personal property, and of lands located in different counties, made by a convict in prison to one of his creditors, declared to be a conveyance in contemplation of insolvency to prefer such creditor, is transitory: *McCallister* v. *Savings Bank*, 80 Ky. 684.

In New York, an action to set aside an assignment of property, partly consisting of land, for the benefit of creditors, as fraudulent, is, within the meaning of the statute, a local action, as it affects an estate in real property: *Acker* v. *Leland*, 96 N. Y. 383; while in Illinois it is held that a creditor may maintain a bill in chancery to set aside such a conveyance by his debtor as fraudulent, in any jurisdiction where the debtor and fraudulent vendee may be found, as in such case the court does not act upon the land itself, but simply declares the conveyance void, and removes it as an obstruction to the creditor's legal remedy: *Johnson* v. *Gibson*, 116 Ill. 294.

An action may be maintained in one state by a resident thereof to recover damages for assessing him with an illegal tax in another state, and issuing a warrant for him upon which he was there arrested: *Henry* v. *Sargeant*, 13 N. H. 321; 40 Am. Dec. 146. An action against the maker and indorsers of a note may be brought in any county where any one of the parties defendant resides or may be summoned: *Pearson* v. *Kansas Mfg. Co.*, 14 Neb. 211. Transitory actions upon contracts can be maintained against non-residents, in any county where service can be maintained upon them: *Atkins* v. *Borstler*, 46 Mich. 552. Where the statute provides that transitory actions must be brought in a county where one of the parties resides, they cannot be commenced in a county where neither resides, to be subsequently removed to the proper county for trial: *Haywood* v. *Johnson*, 41 Mich. 598. And transitory actions for which a venue is not provided by statute must be commenced in the county where the defendant resides or may be found at the commencement of the action: *Dunham* v. *Shindler*, 17 Or. 256.

Where, in a local action, causes of action arising in different counties are joined, the venue may be laid in the county in which the action is brought: *Temple* v. *Florida Land etc. Co.*, 23 Fla. 400. In an action to subject lands, lying in different counties and claimed by different defendants, to the payment of debts, the title to all the lands may be tried in an action com-

menced in one of the counties: *Barrett* v. *Watts*, 13 S. C. 441. So an action for malicious prosecution against two defendants jointly, the cause of which arose in one county, in which one of the defendants resides, while the other resides outside the state, may be maintained in another county, where both defendants were found and served with process: *Vinal* v. *Core*, 18 W. Va. 1. When a defendant is in the act of removing from one county to another, and it cannot be ascertained with certainty in which county he resides, an action may be brought against him in either county: *Brown* v. *Boulden*, 18 Tex. 432. So a citizen of one state passing through another may be sued in any county of the latter in which he may be when served with process: *Murphy* v. *Winter*, 18 Ga. 690.

JOHNSON *v.* ARCHIBALD.

[78 TEXAS, 96.]

SURVEY, EVIDENCE TO VARY OR ESTABLISH CALLS IN. — When the calls in a grant, if applied to the land, correspond with each other, parol evidence is not admissible to vary them by showing that they are not the calls in the survey as actually made. If, when so applied, they disclose a latent ambiguity, and conflict with one another, parol evidence may be resorted to for the purpose of determining the conflict, and showing the land actually intended to be embraced by the calls of the survey.

SURVEY — WHAT CALLS PREVAIL. — Calls in a survey for natural objects or marked lines and corners prevail over calls for course and distance.

SURVEY, EVIDENCE TO SHOW. — The survey as actually made may always be shown by any legal evidence, when in fact the lines were run upon the ground.

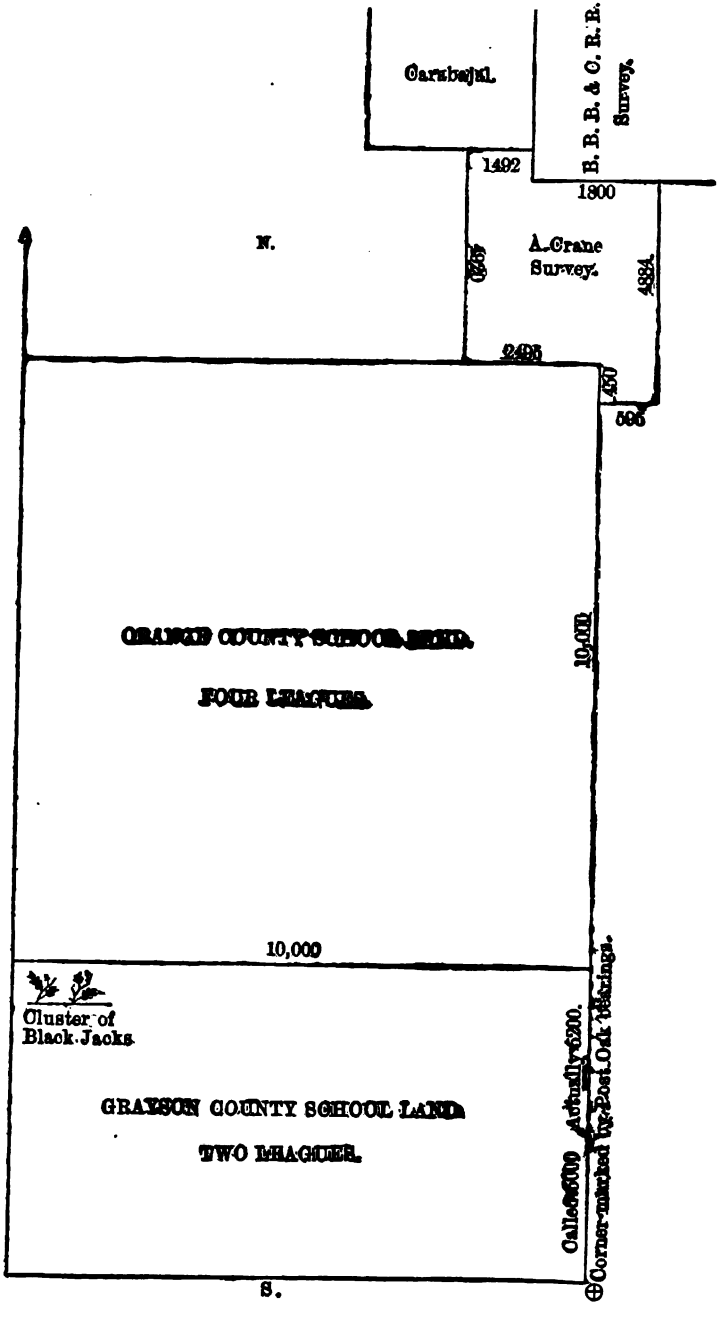
SURVEY — CALL FOR COURSE AND DISTANCE PREVAILS OVER MISTAKEN CALL FOR OBJECT. — Whenever the evidence is sufficient to induce the belief that the mistake in a survey is in the call for a natural or artificial object, and not in the call for course and distance, the latter will prevail, and the former will be disregarded.

SURVEY — EVIDENCE OF MISTAKE IN CALL. — The declaration of the surveyor who made the survey is competent evidence to show that the mistake therein is in the call for a natural object, and not in the call for course and distance.

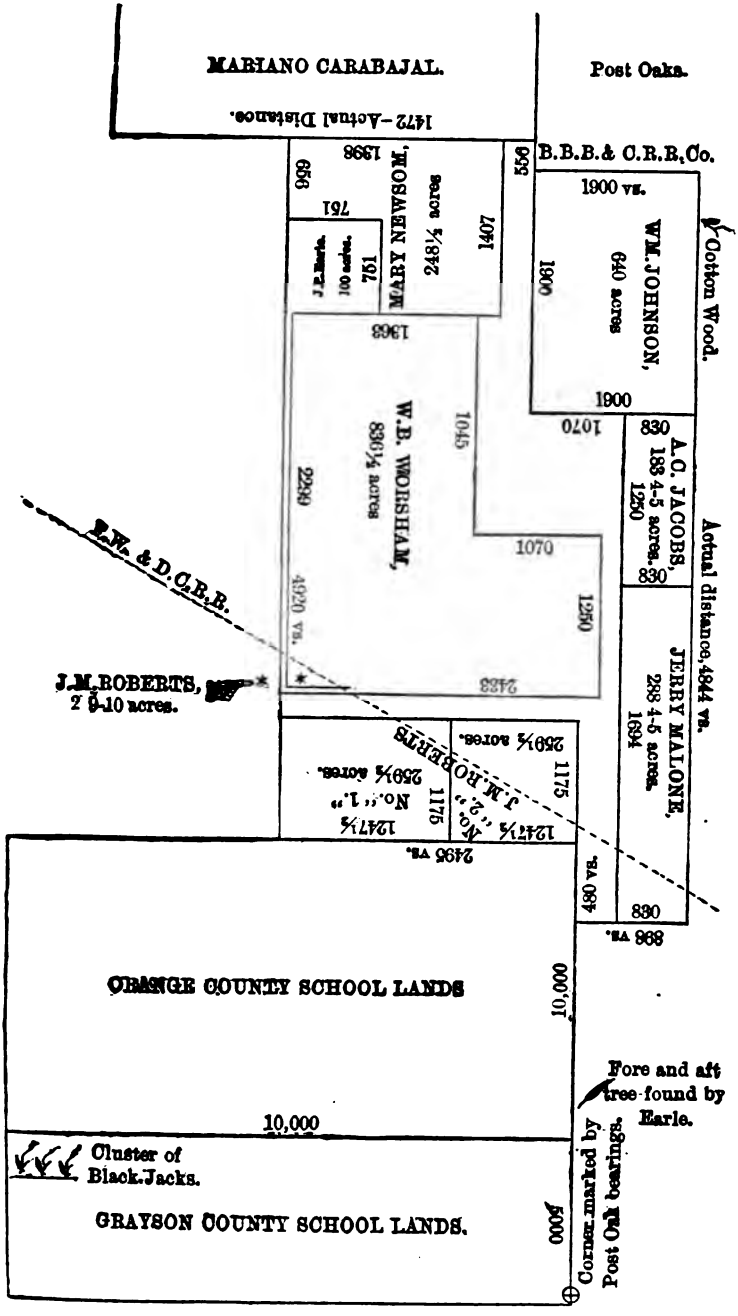
JUDGMENTS, PRESUMPTION IN SUPPORT OF. — When there are no conclusions of fact in the record, and the evidence, though conflicting, is sufficient to support the judgment upon some hypothesis, it will be presumed that the judgment was based thereon.

CONTEST concerning a survey. By the aid of the maps here appended and the facts detailed in the opinion the latter may be fully understood. The first map (page 28) shows the Crane and surrounding surveys. The second map (page 29) shows the Roberts survey south of the supposed line of the Crane survey, together with the subdivisions sold.

MAP No. 1.


Carrabajal.
B. B. B. & C. R. R. Survey.
1492
1800
N.
A. Crane Survey.
935
4934
2495
450
595
10,000
Cluster of Black Jacks
10,000
S.

MAP No. 2.


MARIANO CARABAJAL.
Post Oaks.
1472—Actual Distance.
B.B.B.& C.R.R.Co.
1900 vs.
WM. JOHNSON,
640 acres
1900
Cotton Wood.
1398
959
761
761
100 vs.
2 acres.
M. MOSAWEN KHAM,
248½ acres
1407
955
1868
W.B. WORSHAM,
836¼ acres
1045
1070
2289
1070
1250
4920 vs.
1070
830
A.C. JACOBS,
183 4-5 acres.
1250
830
Actual distance, 4844 vs.
JERRY MALONE,
238 4-5 acres.
1694
830
898 vs.
T.W. & D.C.R.R.
J.M. ROBERTS,
2 9-10 acres.
2428
259½ acres.
J.M. ROBERTS
No. "2."
259½ acres.
No. "1."
259½ acres.
1175
1175
1247½
1247½
2496 vs.
480 vs.
ORANGE COUNTY SCHOOL LANDS
10,000
10,000
Fore and aft tree found by Earle.
Cluster of Black Jacks.
GRAYSON COUNTY SCHOOL LANDS.
5000
Corner marked by Post Oak bearings.

Barrett and Stine, for the appellant.

A. K. Swan, for the appellees.

GAINES, A. J. This suit involves the true location of the boundary lines of the Ambrose Crane survey of land in Clay County, which, according to the calls in the patent, purports to contain 2,141⅛ acres. In December, 1874, the plaintiff below, who is appellant here, was the owner of 640 acres of the survey. So much of the tract is not involved in this suit; but at that time the remainder of the tract was claimed by four persons, each claiming an undivided interest, as follows: B. T. Duval, 420 acres; Fort and Jackson, jointly, 751 acres; and William Jamison, 331 acres. Jamison was also entitled to any excess in the land that might exist over 1,502 acres. Accordingly, on the 7th of December, 1874, these tenants in common had agreed upon a partition, and thereupon Duval, Fort, and Jackson conveyed to Jamison one hundred acres of the land, which was described by metes and bounds, and in consideration thereof Jamison conveyed to them all his interest in the tract held by them all in common, except in the one hundred acres conveyed by them to him. The one hundred acres received by Jamison in the partition lies near the town of Henrietta, and was presumably of more value per acre than the remainder of the tract. At the time of the execution of the partition deeds mentioned above, Duval, Fort, and Jackson executed to Jamison a contract in writing, by which they bound themselves, on or before the first day of September, 1875, to have the land conveyed to them surveyed, and if found to contain more than 1,402 acres, to select that quantity, and to convey what remained to Jamison. This was never done. Subsequent to that contract, Jamison conveyed by quitclaim deed all his interest in the land to the plaintiff. F. W. Randall having, through a chain of mesne conveyances, become the owner of the interest of Fort, Duval, and Jackson, conveyed by metes and bounds separate parcels of the tract to certain of the defendants, in the following order: To defendant Malone, 288⅛ acres; to defendant Worsham, 836½ acres; to A. C. Jacobs, 183⅝ acres; and to Mary Newcomb, 248½ acres. Defendant Conn claims the tract conveyed to Jacobs, as substitute assignee under a deed of assignment made by Jacobs for the benefit of his creditors.

If there is no excess in the acreage of the survey as called for in the patent, Jamison's conveyance to Fort, Duval, and Jackson passed all his title, legal and equitable, in the sur-

vey, and the plaintiff took nothing by the subsequent conveyance from him. The plaintiff, however, contends that there is an excess in the survey of about 680 acres, and brings this suit to recover it.

The patent to the A. Crane calls to begin at the northeast corner of the Orange County school land; thence west 2,495 varas southeast corner of Barret survey; thence north 3,648 varas northeast corner same; thence east 1,344 varas southeast corner of Carabajal; thence south 556 varas southwest corner Buffalo Bayou, Brazos, and Colorado railroad survey; thence east 1,900 varas a stone from which a mesquite marked X bears north 12 east 17 varas a cottonwood 12 inches in diameter marked X bears south 280 varas; then south 270 varas Dry Fork of Wichita at 4,844 varas corner; thence west 749 varas a corner in east boundary line of Orange County school land; thence north 1,752 varas to beginning.

The plaintiff alleged in his petition that there were mistakes in the field-notes in the following particulars, viz.: The call for the second line north 3,648 varas should have been north 4,920; the call east 1,344 varas should have been east 1,472; the last call but one should be west 898 instead of 749 varas. He claims that the survey extends 1,742 varas farther north and south and 151 varas farther east and west than appears by the distances called for in the field-notes of the patent. The testimony of the surveyors shows that there is a mistake in the patent. It appears by a survey of the land that the distance between the north boundary line of the Orange County school land, and the south boundary of the Carabajal, is in fact 4,920 varas, while the distance called for in the patent would make it only 3,648. It is evident, therefore, that there is a mistake in the call for the length of the west boundary line, or in the call for the lines and corner of some one of the surrounding surveys. The contention of the plaintiff is, that the error is in the call for distance, while the defendants insist that the mistake is in the calls for the corner and lines of the Orange County school-land survey.

The northeast corner of the last-named survey is in the prairie, with no objects, natural or artificial, to mark it. Its locality can only be fixed by surveying from the corner of the Grayson County school-land survey, which lies ten thousand varas south of it. Its north boundary line is also unmarked. On the other hand, the lines of the Carabajal and the Buffalo Bayou, Brazos, and Colorado Railway Company

surveys are readily ascertained by corners well marked on the ground.

A witness for defendant testified that one Green, who made the original survey, and who at the time of the trial was dead, told him while running the lines of the tract, that when he surveyed the land originally "he located the whole north line of the Crane survey on the ground by the marks and corners called for in the field-notes; that he run the west line the length called for, and called for the Orange County school land because he supposed he had reached it; that when he had reached the southwest corner of the Crane survey by course and distance, he then went across the prairie to the cottonwood corner and began again, and ran the east boundary line by course and distance called for in the field-notes, thence west and north as called for, and then stopped." If such was the manner in which the survey was made, and if the calls for the corner and lines of the Orange County school lands are to be disregarded, then the land between the survey so established and the latter survey was left vacant. Nearly the whole of this strip is held by defendant Roberts under subsequent locations.

But on the other hand, a witness for plaintiff testified that Green told him "that the only running that he ever did on the ground was from the Dry Fork and the cottonwood bearing near the extreme northeast corner, and this corner he made and chained to these bearings; that he had before run the surveys on the north; that he began the survey on the northeast corner of the survey in the name of Orange County, and he established this corner by running from the southeast corner of the Grayson County, the nearest well-established corner, and going north the distance called for when he began the Crane; that he did this surveying on his horse, with his compass and no chain, but counted the steps of his horse, as he knew the distance he stepped. Witness asked him if he did not know there was a large excess in the Ambrose Crane. He said he only guessed at the length of the lines; that it made no difference; that land was not worth more than fifteen cents an acre, and nobody noticed it or cared about it."

If the calls in a grant when applied to the land correspond with each other, parol evidence is not admissible to vary them by showing that in point of fact they are not the calls of the survey as actually made. But if when so applied they disclose a latent ambiguity, — that is to say, if they conflict with

each other, — then extrinsic evidence may be resorted to, in order to determine the conflict and to show the land actually intended to be embraced by the calls of the survey. Certain calls, such as for natural objects, marked lines, and corners, being less likely the result of mistake, in the absence of other evidence, prevail over calls for course and distance; but the survey actually made is, in legal contemplation, the true survey, and it is always competent to show, by any legal evidence, where the lines were in fact run upon the ground. It follows, therefore, that whenever the evidence is sufficient to induce the belief that the mistake is in the call for natural or artificial objects, and not in the call for course or distance, the latter will prevail and the former will be disregarded.

In *Gerald* v. *Freeman*, 68 Tex. 201, this court held that a call for course and distance should not be subordinated to a call for an unmarked line in a prairie which could not itself be ascertained except by running the boundaries of another survey according to course and distance. In that case, as in this, the declarations of the surveyor were adduced in evidence, and were to the effect that he ran the course and distance called for in the field-notes, and called for the line of a neighboring survey, supposing he had reached it when he had not. The difference between that case and this is, that here there is a conflict of evidence upon the point, and in that there was none. But it was the duty of the court below to determine the conflict, and the finding has evidently been in favor of the theory that the land in controversy was surveyed from the north, and that the lines were actually run upon the ground by the course and the distance called for in the field-notes of the survey. The defendant Roberts did not plead the statute of limitations, and without such finding, the judgment must have gone against him, although the other defendants may have prevailed in the suit.

At all events, there being no conclusions of fact and law found in the record, if the evidence is sufficient to support the judgment upon any defense presented in the case, it is to be presumed that the court found in favor of the defendants upon that issue. Upon the question of excess in the survey, the evidence was sharply in conflict; but we must presume that the court has determined the conflict in favor of the defendants, and the evidence being sufficient to sustain the finding, the judgment must stand.

There is no error in the judgment, and it is affirmed.

SURVEYS. — *What Calls Control.* — In determining boundaries as fixed by surveys, monuments, whether natural objects or artificial marks, prevail over calls for courses and distances; for they are more endurable and less liable to change: *Crampton* v. *Prince*, 83 Ala. 246; 3 Am. St. Rep. 718; *Adair* v. *White*, 85 Cal. 314; *Northern R'y Co.* v. *Jordan*, 87 Cal. 23; *Payne* v. *English*, 79 Cal. 540; *Castro* v. *Barry*, 79 Cal. 444; *Hubbard* v. *Dusy*, 80 Cal. 281; *Redmond* v. *Stepp*, 100 N. C. 212; *King* v. *Brigham*, 19 Or. 560; *Morse* v. *Rollins*, 121 Pa. St. 537; *Bloom* v. *Ferguson*, 128 Pa. St. 362; *Bushey* v. *Iron Co.*, 136 Pa. St. 541; *Scott* v. *Pettigrew*, 72 Tex. 321; *McAninch* v. *Freeman*, 69 Tex. 445; *Jones* v. *Andrews*, 72 Tex. 6; *Menasha etc. Co.* v. *Lawson*, 70 Wis. 600. Monuments have been defined to be "marks made or adopted by the surveyor as evidence of the lines run by him": *Grier* v. *Penn. Coal Co.*, 128 Pa. St. 79. All monuments located and identified are of equal importance: *Scott* v. *Pettigrew*, 72 Tex. 322.

Conflict between Surveys. — Two surveys having been made in 1835, a location was made upon the junior survey, which location was followed by a resurvey, and matured into a patent in 1841. After the issue of this patent, a location was made upon the senior survey of 1835, which was also followed by a resurvey and matured into a patent. The surveys of 1839 having been made without authority, the location and patent under the junior survey has priority over that under the senior survey: *Griffith* v. *Rife*, 72 Tex. 185. Where there is a conflict between two surveys which have matured into patents, and the owner of the junior grant is in possession of a part only of the land in dispute, and the owner of the senior grant is in similar possession of that portion of his grant which is not included in the conflict, the junior grantee can set up the statute of limitations only to the extent of his actual possession: *Anderson* v. *Jackson*, 69 Tex. 346. Official surveys prevail over private ones: *Billingsley* v. *Bates*, 30 Ala. 376; 68 Am. Dec. 126.

Evidence to Establish or Vary Calls, Generally. — Locations made on plats are presumed to have been put there in compliance with the instructions of the surveyor: *Gittings* v. *Hall*, 1 Har. & J. 14; 2 Am. Dec. 502. In ascertaining the boundaries of land conveyed in a deed, a map referred to therein, properly certified to by the proper surveyor, is admissible: *Payne* v. *English*, 79 Cal. 540; *Gibson* v. *Poor*, 21 N. H. 440; 53 Am. Dec. 216; and a plat certified to by a surveyor is sufficient, if from the facts therein given any competent surveyor may locate the parcels of land and ascertain their proper dimensions: *Village of Auburn* v. *Goodwin*, 128 Ill. 58. The lines of a junior survey which calls for a senior survey as an adjoiner may be admitted in evidence for the purpose of showing the acts of a deceased surveyor as to the location of the lines in the senior survey: *Tyrone etc. Co.* v. *Cross*, 128 Pa. St. 636. Parol evidence is admissible of the meaning of the words "John Edward's corner," as used in the description of boundaries in a grant: *Bonaparte* v. *Carter*, 106 N. C. 534. When the question is merely as to the boundary between two anterior surveys of a tract of land, which are admitted to be marked upon the ground, the course of the only unknown line cannot be controlled by a corner on an independent survey: *Bloom* v. *Ferguson*, 128 Pa. St. 362. However, when the boundaries of land described in a survey cannot be established by reference to known monuments, and the courses and distances are irreconcilable, the circumstances, as well as the manifest intention of the parties, may be taken into consideration, for the purpose of fixing such boundaries: *Ruffner* v. *Hill*, 31 W. Va. 429; *Brown* v. *Bedinger*, 72 Tex. 247; *Lilly* v. *Blum*, 70 Tex. 704; *People* v. *Hatch*, 60 Mich. 229; *Mendenhall* v. *Paris*, 84 Cal. 193. But a surveyor can, under no cir-

cumstances, assume to determine lines and fix monuments according to his own notions; he must possess certain *data*, and then can only measure geometrically in accordance with such *data*: *Fisher* v. *Dowling*, 66 Mich. 370; *Jones* v. *Lee*, 77 Mich. 37.

Evidence — Quantity of Land Called for. — When the boundaries can be definitely determined, the number of acres called for in the instrument is immaterial for the purpose of ascertaining the quantity of land actually granted or conveyed: *Doyle* v. *Mellen*, 15 R. I. 523; *Scott* v. *Pettigrew*, 72 Tex. 321; *Luckett* v. *Scruggs*, 73 Tex. 520; but the quantity of land called for may be considered, when the boundaries are in question: *Ellis* v. *Harris*, 106 N. C. 395.

Establishing Lost Corners. — Where an original monument marking a corner in a survey has been lost, its relocation can only be approximately made by measurements from other corners: *Anderson* v. *Peterson*, 74 Iowa, 482. To relocate lost corners, or lines marked and run by a government surveyor, the jury may consider a private survey of the same as well as the known marks and corners, and the field-notes and plat, even though such private survey does not correspond in all respects with the government survey: *Billingsley* v. *Bates*, 80 Ala. 376; 68 Am. Dec. 126. And in relocating lost corners, the rule still holds good that calls for natural objects are preferred to calls for courses and distances: *Tognazzini* v. *Morganti*, 84 Cal. 159; *Walrod* v. *Flanigan*, 75 Iowa, 365. Proceedings to establish lost corners are not triable *de novo* upon appeal, under the Iowa statutes: *Walrod* v. *Flanigan*, 75 Iowa, 365; *Bohall* v. *Neiwalt*, 75 Iowa, 109.

Ancient Boundaries. — After twenty-one years, the lines of a survey are conclusive as stated therein, and it is immaterial whether the marks mentioned in the survey can be found on the land or not: *Grier* v. *Pennsylvania Coal Co.*, 128 Pa. St. 79. For the purpose of establishing ancient boundaries, by locating calls for corners, etc., the declarations of the parties in interest, or those who assisted in making the old survey, are admissible, when such persons are unable to testify orally or by deposition, by reason of sickness or death: *Whitman* v. *Haywood*, 77 Tex. 557; *Griffith* v. *Sauls*, 77 Tex. 630. Ancient fences, used by a surveyor in his attempt to reproduce an old survey, are strong evidence of the location of the original lines, and if they have been standing for many years, should be taken as indicating such lines, even against the evidence of a survey ignoring such fences, based upon an assumed starting-point: *Beaubien* v. *Kellogg*, 69 Mich. 333; for it will not do to allow boundaries to be disturbed upon a survey made from an assumed starting-point, without proof of its being a true line, located and fixed by the original survey: *Beaubien* v. *Kellogg*, 69 Mich. 333; *Carpenter* v. *Monks*, 81 Mich. 103.

Agreements as to Boundaries — Acquiescence therein Amounting to Estoppel. — Where parties, by mutual agreement, fix boundary lines, and thereafter acquiesce in the lines so agreed upon, they must be considered as the true boundary lines between them, even though the period of acquiescence falls short of the time fixed by statute for gaining title by adverse possession: *Jones* v. *Pashby*, 67 Mich. 459; 11 Am. St. Rep. 589, and note; *Eiden* v. *Eiden*, 76 Wis. 435; *Lagow* v. *Glover*, 77 Tex. 448; *Glover* v. *Wright*, 82 Ga. 115; *Koenigs* v. *Jung*, 73 Wis. 178. Where there is a dispute as to boundaries between adjoining owners, acts and admissions of such owners, recognizing a line as a true one, are evidence of its location, when the line is uncertain; but this is not the case where the line is well ascertained: *Davidson* v. *Arledge*, 97 N. C. 172; *State Bridge Co.* v. *Columbia*, 27 S. C. 137. A and B disputed as to a line between them. C owned adjoining lands, which he sold

to D. As between A and B, it was improper to allow D to testify that on a survey of the land purchased by him from C, C ran a certain line as the boundary between A and B, it being shown that they were not present, and it not appearing that C was dead, or that he had authority to make such survey as a surveyor or otherwise: *Alexander* v. *Gossett*, 29 S. C. 421.

Procedure in Cases to Settle Disputed Boundary Lines. — To give a court of equity jurisdiction in cases of disputed boundaries, there must exist not only a dispute as to the boundary line, but also some equity superinduced by the act of the parties: *Wilson* v. *Hart*, 98 Mo. 618; *Love* v. *Morrill*, 19 Or. 545. Where the land in dispute is bounded upon the county line, the jurisdiction of the court depends upon the conformity of the verdict to the evidence of the situation of the premises relatively to such county line: *Jones* v. *McWatty*, 85 Ga. 212. The boundary line between two counties running through lands involved in dispute, service by the sheriff of the county in which suit was instituted, upon the defendant residing in the other county, is proper: *Polhill* v. *Brown*, 84 Ga. 339.

In such suits, the complaint must set out the land in dispute by metes and bounds: *Edwards* v. *Smith*, 71 Tex. 156.

In disputed boundary suits, questions of ownership are not in issue, unless founded upon a prescriptive right, and titles are referred to merely for the purpose of fixing boundaries, not to affect ownership in the lands: *Keller* v. *Shelmire*, 42 La. Ann. 324.

Questions of disputed boundaries, where doubts exist as to monuments, corners, or lines, are issues of fact for the jury: *Scott* v. *Yard*, 46 N. J. Eq. 79; *Fitzgerald* v. *Brennan*, 57 Conn. 511; *Adams* v. *Crenshaw*, 74 Tex. 111; *Roberts* v. *Preston*, 106 N. C. 411; *Marsh* v. *Richardson*, 106 N. C. 539; *Cross* v. *Tyrone etc. Co.*, 121 Pa. St. 387; *Menasha etc. Co.* v. *Lawson*, 70 Wis. 600; *Bewley* v. *Chapman*, 16 Or. 402.

BEXAR BUILDING AND LOAN ASSOCIATION *v.* ROBINSON.

[78 TEXAS, 162.]

USURY — RIGHT TO RECOVER MONEY PAID AS INTEREST, AND MEASURE OF RECOVERY. — Interest voluntarily paid upon a usurious building contract may be recovered after the contract has been executed, in the absence of a statute authorising such recovery, and the measure of recovery is the difference between the debt with legal interest added, and with the amount of payments made, computed as partial payments upon the debt.

P. H. Ward, and Mason and Summerlin, for the appellant.

Tarlton and Keller, for the appellee.

HOBBY, J. The appellee instituted this suit on the fifteenth day of August, 1887, against the appellant, to recover back from it the sum of $1,440 paid by her as interest on a contract alleged to be usurious, and also the further sum of $276 as interest on that sum.

The petition states that she, joined by her husband, then living but now dead, did, on the twenty-third day of March, 1883, enter into a contract with the appellant in the form and under the device of a builder's contract, which contract was attached to and made part of the petition. In this contract it is stipulated that the appellant shall erect a house for appellee for the sum of $4,800, with interest at ten per cent per annum on that sum, which amounts to $40 per month; that this monthly sum was paid for each and every month from the said twenty-third day of March, 1883, up to and including the fifth day of April, 1886; that said contract was not a builder's contract, but was a fraudulent device for evading the usury laws, and that the same was one for the loan of money; and that under said contract she received as a loan from the appellant only the sum of $3,292, upon which she paid interest at the rate of $40 per month, or at the rate of about 14½ per cent per annum.

The petition further alleges that the appellee, prior to the institution of the suit and before the maturity of the contract, paid, in addition to said sum of $1,440 as interest, the said sum of $3,292.

The appellant filed a general demurrer to the petition, and excepted to it specially that the petition and the exhibit showed the contract to be a building contract, and showed a final settlement between the parties, and that it contained no allegations of fraud, deceit, or mistake to authorize the court to reopen said settlement.

The demurrer and exceptions were overruled by the court.

The appellant filed an answer admitting the execution of the contract attached to the petition, and alleging that the same was what it on its face purported to be, a contract for the building of a house for the sum of $4,800, and that it was such a contract as under its charter and by-laws it was permitted to make; that it fully complied with said contract, and that appellee accepted the building erected under said contract; that the appellee was a stockholder in the appellant association, and, as such, she had the right on a final settlement to have applied to said indebtedness of $4,800 the value of her shares of stock in the appellant association; that on the fifth day of April, 1886, and long before the maturity of the indebtedness under the contract, the appellee made a full and final settlement with the appellant of all demands arising out of said contract, and that in said final settlement she was cred-

ited with the value of her said shares of stock, including the profits which the said shares of stock had earned, and appellant therefore pleaded an accord and satisfaction, also the statute of limitation of two years to the recovery of $1,440 paid as interest.

A trial by the court without a jury resulted in a judgment for the appellee for $1,102.95, with interest from September 16, 1887.

The controlling question in the case raised by the assignments of error is, whether interest voluntarily paid upon an alleged usurious contract can be recovered after the contract has been executed, in the absence of a statute authorizing such recovery.

The contract in this case, upon its face, is a building contract, providing by its terms for the erection of a building, described, for appellee, in consideration of the sum of four thousand eight hundred dollars, to be paid by appellee at the maturity of certain stock owned by appellee in the building association.

There are, no doubt, cases which deny the party paying usurious interest the right to maintain an action or suit for its recovery, upon the principle that the parties are equally in the wrong, and that the injury, if any, is the result of a voluntary act.

Under the statute of Missouri regulating this subject, it was held that no provision was made by which the borrower could recover back money paid voluntarily as usurious interest.

The opinion in the case is largely influenced by the peculiar statute of that state.

It appears that where the answer in that state raises the issue as to usury, and the judgment finds it to be established, the interest is forfeited to the school fund. And to hold that a party can institute a suit to recover back such interest when voluntarily paid would have the effect to discourage such defense, as the recovery would, when he brings suit, inure to his benefit; but it would not where it is pleaded as a defense: *Ransom* v. *Hays*, 39 Mo. 449.

In Iowa, also, the policy of the statute, which "regards the parties to the contract *in pari delicto*, holds them obnoxious to its animadversions, and makes the school fund the recipient of the forfeiture, would be defeated by allowing the borrower to recover usurious interest voluntarily paid": *Nicholls* v. *Skeel*, 12 Iowa, 302.

In Georgia, it has been held, in substance, that upon the settlement of a transaction which embraces an item or feature of usurious interest, and the attention of the party paying such interest is distinctly called to it, and it is then knowingly included in the final adjustment, a recovery cannot be subsequently had for such usurious interest: *Parker* v. *Fulton etc. Building Ass'n*, 46 Ga. 166. The inference deducible from this case is, that if the party's attention be not distinctly directed to the obnoxious feature of the transaction, a recovery could be had.

Under the statute of Maryland, a recovery is not allowed where no compulsion is used, and an excess of lawful interest is paid with full knowledge: *Awalt* v. *Eutaw etc. Building Ass'n*, 34 Md. 435.

We believe it will be found that in the states mentioned the above rule obtains generally by reason of some peculiar policy or language of the statute, neither of which exist in our state.

An eminent writer says, on the other hand, that "equitable relief is granted against usurious contracts, whether executory or executed, since, from considerations of public policy, the two parties are not regarded as standing in *in parti delicto*": 2 Pomeroy's Eq. Jur., sec. 937.

At an early date Lord Mansfield denied that the parties were equally wrong: Endlich on Building Associations, sec. 359.

"Equity," says the author first mentioned, "will never assist a party to carry into effect his own intentional violation of the law." But "it is well settled that courts of equity will go further, and will give all the affirmative relief which is just to the borrower. If the contract is executed, he may recover back the usurious amount paid in excess of the sum actually borrowed, and legal interest thereon": Endlich on Building Associations, sec. 359.

"Such contracts being declared void by the statute against usury, equity will follow the law in the construction of the statute. If the borrower seeks relief against the usurious contract, the terms upon which the court will interfere are that the plaintiff will pay the defendant what is really due, deducting the usurious interest": 1 Story's Eq. Jur., secs. 301, 302.

"Nor is the payment of the usurious interest such a voluntary payment as entitles the receiver to retain it": Endlich on Building Associations, sec. 359.

Our statute declares that "all written contracts whatsoever which may in any way, directly or indirectly, violate the article prohibiting a stipulation for interest at a rate greater than twelve per cent per annum shall be void and of no effect for the whole rate of interest only," etc.: Rev. Stats., art. 2979. There is nothing in our statute which indicates a purpose to destroy the common-law or equitable right to recover, by affirmative action, such interest.

Article 2981 provides that "no evidence of usurious interest shall be received on the trial of any case unless the same shall be specially pleaded and verified by affidavit of the party wishing to avail himself of such defense."

It is claimed that this does not authorize an independent action for the recovery of usurious interest.

We do not think it was the intention of this article to preclude a party from asserting his right to recover in the capacity of plaintiff. The article last referred to applies to those who "wish to avail themselves of this defense," not to one seeking, affirmatively, relief at law or in equity. Under our laws regulating limitation, it is provided that "the laws of limitation shall not be made available to any person in any suit in any of the courts of this state, unless it be specially set forth as a defense in the answer": Rev. Stats., art. 3220. This is certainly as restrictive as article 2981. But this, we apprehend, would not preclude a party from establishing, affirmatively, his right by limitation in the capacity of plaintiff: *Winburn* v. *Cochran*, 9 Tex. 125; *Moody* v. *Holcomb*, 26 Tex. 719.

We think a suit like the present may be maintained.

"The essential elements of a usurious contract consist of a loan, with the understanding that the money loaned is to be returned, and that a greater rate of interest is paid than the statute allows. Whether this be done directly or indirectly, or whatever may be the form or phase the contract assumes, is altogether immaterial": Endlich on Building Associations, sec. 358.

The evidence in the case shows that the amount of interest agreed to be paid by Mrs. Robinson under the contract with appellant was usurious, as it exceeded the highest rate recognized by our law, to wit, twelve per cent. But in contracting to pay this rate, she necessarily contracted to pay twelve per cent, hence we think the appellant would be entitled to recover the amount of the loan made to her on

March 23, 1883, together with twelve per cent interest per annum thereon; that she is entitled to credit for the amounts paid by her at the different times shown by the evidence. And that the rights of the parties may be adjusted under the well-recognized rules applicable to partial payments, we think the judgment should be reversed, and the cause remanded.

PAYMENT OF USURIOUS INTEREST — RECOVERY BACK. — Payment of usurious interest is regarded as made under moral duress, and is therefore excepted from the operation of the ordinary rule that voluntarily paying an illegal claim estops the payor from maintaining an action to recover such payment. Payment of usurious interest may be recovered back at any time prior to the bar interposed by the statute of limitations: *Peterborough Sav. Bank* v. *Hodgdon*, 62 N. H. 300; *Sherley* v. *Trabue*, 85 Ky. 71; *Wheaton* v. *Hibbard*, 20 Johns. 290; 11 Am. Dec. 284. And under some statutes double the amount of usurious interest paid may be recovered back by the debtor: *Utley* v. *Cavender*, 31 S. C. 283; *Schuyler Nat. Bank* v. *Bollong*, 24 Neb. 825. But in Michigan the courts grant no relief to him who voluntarily fulfills a usurious contract: *Dykes* v. *Wyman*, 67 Mich. 237. The rule, however, seems to be, that voluntary payments do not estop the debtor in cases of usurious interest: *Hardin* v. *Trimmier*, 27 S. C. 111; *Marshall* v. *Pope*, 84 Ga. 452. The measure of recovery back is the excess paid over the amount of legal interest: *Dickerson* v. *Thomas*, 67 Miss. 778; *Zeigler* v. *Scott*, 10 Ga. 389; 54 Am. Dec. 395, and note 400–402, upon the question of recovering money paid as usury; note to *Davis* v. *Garr*, 55 Am. Dec. 399, 400. In *Kendall* v. *Crouch*, 88 Ky. 199, it is decided that where usury is paid upon a judgment, no right to recover it back accrues to the judgment debtor so long as the judgment remains in force; nor does the statute of limitations begin to run against a proceeding to enforce the restitution of usury paid upon a judgment, until the same is vacated. In *Stoddard* v. *Lloyd*, 79 Iowa, 1, however, it was decided that where defendants, merely for the purpose of evading the usury laws, consented to judgments against them upon usurious notes, and then gave new notes for the amount of such judgments, the defense of usury might be set up as against the new notes, but that the burden rested upon the makers of the notes to show that the judgments were obtained under such circumstances. In *Kearney* v. *First Nat. Bank*, 129 Pa. St. 577, the court held that where usurious interest on a note made payable to a national bank is included in a renewal note, without an agreement that it is to be a payment of the old note, and the same is afterwards merged in a judgment, and fully satisfied, the penalty for charging and accepting usury on loans cannot be enforced.

GAINESVILLE, HENRIETTA, AND WESTERN RAILWAY COMPANY *v.* HALL.

[78 TEXAS, 169.]

DAMAGES — INJURY FROM CONSTRUCTION AND OPERATION OF PUBLIC WORKS. — When by the construction of any works there is a physical interference with any right, public or private, which the owner or occupier of property is by law entitled to make use of in connection with such property, and which gives an additional market value thereto apart from the uses to which any particular owner or occupier may put it, there is a right to compensation, if, by reason of such interference, the property, as property, is lessened in value.

CONSTITUTIONAL LAW — DAMAGES FOR OPERATION OF PUBLIC WORKS. — A constitutional provision that "no person's property shall be taken, damaged, or destroyed for or applied to a public use without adequate compensation being made" is sufficiently comprehensive to include damages resulting from the operation of public works, as well as those which are inflicted by their construction.

CONSTITUTIONAL LAW — DAMAGES FOR OPERATION OF RAILROAD. — Under a constitutional provision that "no person's property shall be taken, damaged, or destroyed for or applied to a public use, without adequate compensation being made," a land-owner whose property is injured by the construction of a railroad, and the vibration, smoke, noxious vapors, and noise of passing trains, is entitled to damages, although such road is not upon his land nor is any of his property taken in its construction.

WITNESSES — OPINION AS EVIDENCE. — In an action to recover damages from a railroad company for injury to property from passing trains, an inquiry of a witness as "to what amount, if any, is your property depreciated in market value by reason of the construction and operation of defendant's railroad, taking into consideration the physical disturbances to said property only, if any, such as noise, smoke, noxious vapors, and vibrations, and excluding from your consideration all damages and inconvenience sustained in common with the community at large," is objectionable, as calling for an opinion upon a matter involving a mixed question of law and fact.

R. C. Foster and A. E. Wilkinson, for the appellant.

C. C. Potter, and Stuart, Bailey, and Harris, for the appellee,

GAINES, A. J. This action was brought by appellee against the appellant corporation to recover damages to certain real estate, alleged to have been caused by the construction of the defendant's railroad and the operation of its trains. The plaintiff's property consists of a lot in the suburbs of the city of Gainesville, upon which he resides with his family, and has a dwelling-house and other improvements appropriate to a place of residence. The dwelling-house stands twenty-six feet from the south boundary line of the lot. The defendant company took no part of plaintiff's land, but constructed its road

parallel to such line at a distance from it of about thirty-seven feet. The damages were claimed by reason of the vibration, noise, smoke, noxious vapors, and cinders incident to the running of trains over the road.

The court charged the jury, in effect, to find for the plaintiff if his property had been damaged by the construction and operation of defendant's road, provided such damage resulted from the vibration, smoke, noxious vapors, and the noise of passing trains; and that they should not take into consideration any damage plaintiff had suffered in common with the community generally. The defendant asked the court to give the following charge, which was refused: "The mere construction and operation of the railroad of defendant upon land adjoining plaintiff's premises, and in the proper and usual manner in which railroads are built and operated, was not an unlawful act, nor could it be denominated a nuisance; and the inconvenience to plaintiff or the owner of the premises from such vibration, noise, and smoke as were incident to the ordinary operation of the railroad by running from four to six trains per day past plaintiff's premises does not give him a cause of action for damages or depreciation in the value of his premises occasioned thereby. You are therefore instructed to return a verdict for the defendant."

The giving and the refusal of these instructions respectively present the fundamental question in this case, and involves the construction of that portion of our present constitution which provides that "no person's property shall be taken, damaged, or destroyed for or applied to a public use without adequate compensation being made, unless by consent of such person": Art. 1, sec. 17.

The precise question made by the facts of this case is one of the first impression in this court. In *Gulf, Colorado, and Santa Fé R'y Co.* v. *Fuller*, 63 Tex. 467, damages were allowed the plaintiff for an injury to his property resulting from the construction and operation of the defendant's railroad along a street in front of his lots. The plaintiff having an easement in the street peculiarly essential to the full enjoyment of his property, the court held that the appropriation of the street was a taking within the meaning of the constitution. But the court also say: "If, however, there has been no taking of the property of the appellee within the meaning of the constitution, there can be no doubt that it has been damaged, if the evidence offered to support the averments of the petition be

true. The word 'damaged' is evidently used in the sense in which the word 'injured' is ordinarily understood. By damage is meant 'every loss or diminution of what is a man's own, occasioned by the fault of another,' whether this results directly to the thing owned, or be but an interference with the right which the owner has to the legal and proper use of his own. If by the construction of a railway or other public work an injury peculiar to a given property be inflicted upon it, or its owner be deprived of its legal and proper use, or of any right therein or thereto, — that is, if an injury not suffered by that particular property or right in common with other property or rights in the same community or section by reason of the general fact that the public work exists be inflicted, — then such property may be said to be damaged."

In *Gulf, Colorado, and Santa Fé R'y Co.* v. *Eddins*, 60 Tex. 656, the same question was decided in the same way. The cases cited differ from the case before us in the respect that in each of them the street in front of the property damaged was appropriated, while in this the road was not constructed along or over any public highway adjacent to the plaintiff's lot. We think the language quoted from the opinion in the Fuller case lays down the true rule. The use of the disjunctive conjunction, in the provision of the constitution under consideration, indicates clearly that it was not necessary that there should be a taking, to entitle the owner of property to compensation for any special damage that might result to it from the construction of a public work.

In *Texas etc. R'y Co.* v. *Meadows*, 73 Tex. 82, this subject came up for consideration, and the court say: "If a railroad company condemned or otherwise acquired for its purposes a right of way over land, and in constructing its road did an act injurious to an adjacent or neighboring proprietor, for which if done by the original owner he would have been responsible at common law, the company should be held liable to compensate the proprietor so injured. We do not understand that it was intended to give an action against those constructing public works for acts which if done by persons in pursuit of a private enterprise would not have been actionable."

There is high authority for holding that the charter of a railroad company, even in the absence of a statutory or constitutional law allowing compensation for incidental damage, does not exempt it from suits by persons whose property is injuriously affected by its works, although it be properly con-

structed and carefully operated, at least in cases where, in pursuance of its charter, the works of the corporation could have been so located as to avoid the injury: *Baltimore etc. R. R. Co.* v. *Fifth Baptist Church*, 108 U. S. 317.

The doctrine as above qualified may be sustainable, but the great weight of authority is to the effect that in the absence of constitutional restrictions the legislative grant legalizes all acts done in strict pursuance of the power conferred, and that persons whose property has been damaged but not taken must suffer the loss. If the power does not confer authority to do the act despite the damage, it would be the right of an owner whose property is injuriously affected by the operation of a railroad to enjoin such operation as a nuisance, and thus defeat the grant. We think that the insertion of the words "damaged or destroyed," in the provision of the constitution under consideration, was at all events intended to obviate any question of exemption from liability to the owner for property injuriously affected by a public work, and to provide a remedy for any damage which in such cases the legislature might authorize to be inflicted. It is sufficient for the determination of this case to say that it was certainly intended that the legislature should not authorize a corporation to do an act for a public use which if done by an individual without legislative sanction would be actionable, and at the same time exempt it from liability to respond in damages to the owner whose property had been injured. Such was the opinion expressed in *Texas etc. R'y Co.* v. *Meadows*, 73 Tex. 32, previously cited.

We are then brought to the inquiry whether or not the carrying on of any business by a natural person upon his own land which, by reason of the noise, smoke, and vibration caused by the operation of powerful machinery, materially diminished the enjoyment of the property of another and rendered it less desirable as a residence, and depreciated its market value, is a nuisance at common law.

The doctrine announced in *Burditt* v. *Swenson*, 17 Tex. 489, 67 Am. Dec. 665, leads inevitably to the conclusion that it is. In that case the court quoted Blackstone, who says: "If one does any act, in itself lawful, which, being done in that place, necessarily tends to the damage of another's property, it is a nuisance." That a nuisance may be created by smoke, noise, noxious vapors, or other physical disturbances of the enjoyment of property is a proposition in accordance with sound principles, and is well supported by authority: *Balti-*

more etc. R. R. Co. v. *Baptist Church*, 108 U. S. 317; Wood on Nuisances, sec. 611, and cases cited; *Jeffersonville etc. R. R. Co.* v. *Esterle*, 13 Bush, 667; *Bangor etc. R. R. Co.* v. *McComb*, 60 Me. 290.

There was evidence in this case tending to show that by reason of the noise, smoke, and vibration produced by the operation of the defendant's road the plaintiff's property had been greatly diminished in value. The following is the rule laid down by an eminent English judge as applicable to cases like this: "When by the construction of any works there is a physical interference with any right, public or private, which the owners or occupiers of property are by law entitled to make use of in connection with such property, and which gives an additional market value to such property, apart from the uses to which any particular owner or occupier might put it, there is a title to compensation, if by reason of such interference the property, as property, is lessened in value": *Metropolitan Board* v. *McCarthy*, L. R. 7 H. L. 243. The charge of the court was in accordance with these principles, and was not erroneous. The charge requested was based upon contrary principles, and was properly refused.

We deem it proper, before leaving this subject, to comment briefly upon the case of *Hammersmith R'y Co.* v. *Brand*, L. R. 4 H. L. 171, upon which appellant seems mainly to rely for a reversal of the judgment. In its decision a great amount of labor and a great wealth of learning was expended. The plaintiff's claim in that case was precisely like the claim in this. The court of queen's bench held that the plaintiff was not entitled to recover: *Brand* v. *Railway Co.*, L. R. 1 Q. B. 130. This judgment was reversed in the exchequer chamber (L. R. 2 Q. B.), but upon final appeal to the house of lords was sustained. Four of the five judges who were cited to advise the lords were of the opinion that the plaintiff was entitled to recover, and in that opinion one of the law lords concurred. Two of the law lords held the contrary opinion, and the house gave judgment accordingly. The important fact, however, is, that the decision of the case turned upon the construction of the acts of Parliament which allowed compensation to owners "when lands were taken or injuriously affected" by the construction of public works. The question was, whether compensation was intended to be allowed only for damages occurring from the construction of the works, or whether it included also such damages as resulted from the

operation of the trains after the works had been constructed. The damages in the case were clearly of the latter character, and each of the judges who gave an opinion against the right of compensation placed it distinctly upon the ground that the acts of Parliament commonly called the Land Clauses Act and the Railway Clauses Act gave compensation only for such damages as resulted from the construction of the railroad, and not from the operation of its trains. The decision of the case was made to depend purely upon a matter of verbal construction. All the judges conceded that the plaintiff's property had been injuriously affected, "and that if the language of the statute had been broad enough to embrace damages re-resulting from the operation of the works, the plaintiff would have been entitled to recover."

In the case of *Metropolitan Board* v. *McCarthy*, above cited, the damages claimed resulted from the construction of the works, and the right of recovery was maintained in the common pleas, in the exchequer chamber, and in the house of lords: L. R. 7 Com. P. 508; L. R. 8 Com. P. 191; L. R. 7 H. L. 243. The question was again considered, and the doctrine of the case last cited affirmed in *Railway* v. *Walker's Trustees*, L. R. 7 App. Cas. 259.

There is no such difficulty under the provision of our constitution as was presented in the construction of the English statutes. The language, "no person's property shall be taken, damaged, or destroyed for or applied to a public use without adequate compensation being made," is sufficiently comprehensive to include damages resulting from the operation of public works, as well as those which are inflicted by their construction merely. The property in this case was damaged for a public use by the operation of the railroad, and the damage comes as clearly within the provision of the constitution as damages which result immediately from the construction of the road. The property is subjected to a perpetual servitude for the benefit of the public, and the owner is entitled to his compensation for his damage. The following American cases bear upon the question we have been considering, and support the conclusion we have announced: *Columbia etc. Bridge Co.* v. *Geisse*, 35 N. J. L. 558; *Chicago* v. *Taylor*, 125 U. S. 161; *Rigney* v. *Chicago*, 102 Ill. 64; *Rearden* v. *San Francisco*, 66 Cal. 492; 56 Am. Rep. 109; *Chicago etc. R. R. Co.* v. *Ayres*, 106 Ill. 511; *Hot Springs R. R. Co.* v. *Williamson*, 45 Ark. 429.

During the progress of the trial, the following question was propounded to plaintiff on his behalf, while being examined as a witness, as well as to his other witnesses: "To what amount, if any, is your property depreciated in market value by reason of the construction and operation of defendant's railroad, taking into consideration the physical disturbances to said property only, if any, such as noise, smoke, noxious vapors, and vibrations, and excluding from your consideration all damages and inconveniences sustained in common with the community at large?"

The question was objected to by the defendant, on the ground that it called for the opinion of the witnesses upon a matter involving a mixed question of law and fact. We think that the question was improper, and that the objection should have been sustained. But in so far as the answer of the plaintiff was concerned, no harm resulted to the defendant. He did not give a direct response to the question, but answered that the market value of the place was almost totally destroyed; that without a railroad it would be worth, at a low estimate, four thousand dollars, and its value was decreased, from the causes enumerated, from one half to three fourths of that amount. The result was the same as if the witness had been asked the value of the property before the railroad was built and afterwards, and the cause of the depreciation in value, if any, and had answered it was worth, before the construction, four thousand dollars, but since the construction was not worth more than one thousand or two thousand dollars, and the cause of the decrease was the noise, smoke, and vibration caused by the moving trains. Neither the bill of exceptions nor the statement of facts show the answers of the other witnesses to the question, and without knowing what the answers were, we cannot say whether the defendant was prejudiced or not. They may have answered that in their opinion there was no damage.

We find no reversible error in the record, and the judgment is affirmed.

EMINENT DOMAIN. — *Power to Take Private Property for Public Purposes.* — The power to take private property for public use under the right of eminent domain is vested in the legislature alone: *Groff's Appeal*, 128 Pa. St. 621; *Whitsett* v. *Union Dep. & R'y Co.*, 10 Col. 243; *Matter of Niagara Falls etc. R'y Co.*, 108 N. Y. 375; *Matter of Poughkeepsie Bridge Co.*, 108 N. Y. 483; and the necessity for condemning private property is not a subject of judicial cognizance, but lies exclusively within the province of the legislature: *State* v. *Rapp*, 39 Minn. 65; *Aldridge* v. *Spears*, 101 Mo. 400;

Dalles L. Co. v. *Urquhart*, 16 Or. 67; *Tait* v. *Central L. Asylum*, 84 Va. 271. But the legislature may delegate this power to corporations or individuals: *Moran* v. *Ross*, 79 Cal. 159; *Matter of Poughkeepsie Bridge Co.*, 108 N. Y. 483. Authority to exercise this right must be strictly construed: *Matter of Poughkeepsie Bridge Co.*, 108 N. Y. 483; *Godchaux* v. *Carpenter*, 19 Nev. 415.

For What Purposes may Private Property be Taken. — The legislature can take private property for public uses only: *Forney* v. *Fremont etc. R. R. Co.*, 23 Neb. 465; *Hancock Stock etc. Co.* v. *Adams*, 87 Ky. 417; *Chicago etc. R'y Co.* v. *Chicago*, 132 Ill. 372; *Dalles L. Co.* v. *Urquhart*, 16 Or. 67; and never for private purposes: *In re Barre Water Co.*, 62 Vt. 27; *Hancock Stock etc. Co.* v. *Adams*, 87 Ky. 417. Whether the use is really a public use is a judicial question for the courts to determine: *Matter of Niagara Falls etc. R'y Co.*, 108 N. Y. 375; *St. Joseph etc. R. R. Co.* v. *Hannibal etc. R. R. Co.*, 94 Mo. 535; *Aldridge* v. *Spears*, 101 Mo. 400; and is subject to a review in the appellate court: *Railroad Co.* v. *Iron Works*, 31 W. Va. 710. The district court has power to decide the question as to whether a condemnation has been actually made, but not to make the condemnation: *Ackerman* v. *Huff*, 71 Tex. 317. Property already taken for public uses may be taken for other public purposes: *Graff's Appeal*, 128 Pa. St. 621.

What Constitutes a Taking of Private Property. — The word "taken," as used in statutes providing a compensation for private property "taken" for public uses, means an actual assumption by the taking party of exclusive possession at the termination of the proper judicial proceedings: *Woodruff* v. *Callin*, 54 Conn. 277; but any restriction of the common use of private property which destroys its value or strips it of its attributes is a violation of the owner's rights therein: *Janesville* v. *Carpenter*, 77 Wis. 288; 20 Am. St. Rep. 123. Citizens cannot be disturbed in the enjoyment of their property, unless there exists a real and public necessity for condemnation under the right of eminent domain: *Detroit* v. *Daly*, 68 Mich. 503. Every land-owner may object to giving up his land to the use of a railroad company, and may base his objections upon the value of the land and a lack of the necessity for the location and extension of such railroad over his land under any conditions: *Grand Rapids etc. R. R. Co.* v. *Weiden*, 70 Mich. 390; but objections cannot be raised by third parties not interested in the lands: *Kettle River R'y Co.* v. *Railway Co.*, 41 Minn. 461.

Proceedings to Condemn. — The right of eminent domain can be exercised only in the manner pointed out by statute: *Allen* v. *Railroad*, 102 N. C. 381; *Galveston etc. R'y Co.* v. *Railway Co.*, 72 Tex. 454; *Fort Worth St. R'y Co.* v. *Queen City R'y Co.*, 71 Tex. 165; *Chicago etc. R'y Co.* v. *Chicago*, 132 Ill. 372; *Matter of Union Elevated R. R. Co.*, 112 N. Y. 61. Condemnation proceedings are not, strictly speaking, ordinary civil actions: *Lake Shore etc. R'y Co.* v. *Cincinnati etc. R'y Co.*, 116 Ind. 578; but are proceedings purely statutory, in which the statute must always be strictly complied with: *Colorado etc. R. R. Co.* v. *Allen*, 13 Col. 229; *Chicago etc. R'y Co.* v. *Young*, 96 Mo. 39; *Ames* v. *Union County*, 17 Or. 601; *Neale* v. *Superior Court*, 77 Cal. 28. When the statute gives the land-owner a specific remedy for the recovery of damages, that remedy must be pursued: *Wagner* v. *Salzburg Township*, 132 Pa. St. 636.

Necessity of Compensation. — Private property cannot be taken under the right of eminent domain, in the absence of the owner's consent, without fully compensating him therefor: *Organ* v. *Memphis etc. R. R. Co.*, 51 Ark. 236; *San Diego L. Co.* v. *Neal*, 78 Cal. 63; *Oliver* v. *Union Point etc. R. R. Co.*, 83 Ga. 257; *Grand Rapids etc. R. R. Co.* v. *Chesebro*, 74 Mich. 466; *Grand*

Rapids etc. R. R. Co. v. *Weiden*, 70 Mich. 391; *Dalles L. Co.* v. *Urquhart*, 16 Or. 67; *Fort Worth etc. R'y Co.* v. *Queen City R'y Co.*, 71 Tex. 165; *Fisher* v. *Baden G. Co.*, 138 Pa. St. 301. But compensation need not be made for remote and consequential damages occasioned to private property as an indirect result of public works constructed by the state or under its authority: *Green* v. *State*, 73 Cal. 29; *Howe* v. *Inhabitants of Weymouth*, 148 Mass. 605; *Land Co.* v. *Neale*, 88 Cal. 50. Compare note to *Currie* v. *Waverly etc. R. R. Co.*, 19 Am. St. Rep. 458, 459.

Measure of Damages: See *Currie* v. *Waverly etc. R. R. Co.*, 52 N. J. L. 381; 19 Am. St. Rep. 452, and note 459, 460. Damages for which compensation must be made include all such damages as arise from a diminution in the value of the property: *Chicago etc. R'y Co.* v. *Hazels*, 26 Neb. 364; the proper measure of damages being, — 1. Compensation for the property actually taken, equal to the actual value of the same at the time when condemned: *Colorado etc. R'y Co.* v. *Brown*, 15 Col. 193; *Railway Co.* v. *Combs*, 51 Ark. 324; *Chicago etc. R'y Co.* v. *Wiebe*, 25 Neb. 542; *Kiernan* v. *Chicago etc. R'y Co.*, 123 Ill. 188; 2. Compensation for damages to the residue of the land or property, equal to the actual diminution of its market value for any reasonable use to which it might be put: *Colorado etc. R'y Co.* v. *Brown*, 15 Col. 193; *Chicago etc. R'y Co.* v. *Wiebe*, 25 Neb. 542; *Kiernan* v. *Chicago etc. R'y Co.*, 123 Ill. 188; *Thompson* v. *Sebasticook etc. R. R. Co.*, 81 Me. 40; *North C. R'y Co.* v. *Holland*, 117 Pa. St. 613; *Forney* v. *Fremont etc. R. R. Co.*, 23 Neb. 465; *St. Louis etc. R'y Co.* v. *McAuliff*, 43 Kan. 185. In estimating the amount of depreciation in the value of property, a portion of which has been condemned for public uses, evidence may be received of damages resulting to the owner by being deprived of a home or place of business: *Covington etc. R'y Co.* v. *Piel*, 87 Ky. 267; or of damages done to growing crops, both inside and outside of the land condemned: *Haislip* v. *Wilmington etc. R. R. Co.*, 102 N. C. 376; or of damages to the land for farming purposes: *Weber* v. *Stagray*, 75 Mich. 33; or of a tendency to depreciate the value by frightening teams used for farm purposes: *Railway* v. *Combs*, 51 Ark. 324; or of a decrease in rental value by reason of dirt, ashes, smoke, and cinders filling the air: *McGean* v. *Manhattan etc. R'y Co.*, 117 N. Y. 219. But a party cannot have his damages increased on account of the loss of a gratuitous privilege which he has been enjoying only by sufferance: *Ranlet* v. *Concord R. R. Corp.*, 62 N. H. 561. As tending to depreciate the market value of the land, the jury cannot consider such damages for stock as are liable to be killed, or fires liable to be set out by locomotives, passengers, or servants, without distinguishing between what may be negligently done and what may occur accidentally without negligence: *Chicago etc. R. R. Co.* v. *Palmer*, 44 Kan. 110.

Benefits Accruing to the Owner of the Land: See note to *Currie* v. *Waverly etc. R. R. Co.*, 19 Am. St. Rep. 460. In arriving at the just compensation to be made to the owner of land appropriated for public use, the value of the land taken for actual use must be considered in relation to the entire tract, and must include the actual injury to the improvements, of every character and every tendency to diminish the value of the entire tract: *Colusa County* v. *Hudson*, 82 Cal. 633; *Council Grove etc. R'y Co.* v. *Center*, 42 Kan. 438; but nothing can be deducted by reason of benefits that may be reasonably anticipated: *Asher* v. *Louisville etc. R. R. Co.*, 87 Ky. 391; *Benton* v. *Inhabitants of Brookline*, 151 Mass. 250; but in *McKusick* v. *Stillwater*, 44 Minn. 372, *Wilcox* v. *Meriden*, 57 Conn. 120, *Newman* v. *Metropolitan E. R. R. Co.*, 118 N. Y. 619, *Long* v. *Harrisburg etc. R. R. Co.*, 126 Pa. St. 143, *Haislip* v. *Wilmington etc. R. R. Co.*, 102 N. C. 376, the rule is laid down that both the advan-

tages and disadvantages accruing to the land-owner may be considered in estimating the compensation to which he is entitled. The land-owner cannot be compensated for improvements made by another under a supposed right: *Ellis* v. *Rock Island etc. R'y Co.*, 125 Ill. 82; nor for improvements placed upon the land by the railway company or its predecessor in interest prior to the commencement of the condemnation proceedings: *San Francisco etc. R. R. Co.* v. *Taylor*, 86 Cal. 246.

Evidence. — *Opinions as to Value of Land:* See note to *Currie* v. *Waverly etc. R. R. Co.*, 19 Am. St. Rep. 460. There is no fixed rule as to how much a witness must know about the property, to enable him to testify as to its value: *Papooshek* v. *Winona etc. R. R. Co.*, 44 Minn. 195; the question resting largely within the discretion of the court: *Phillips* v. *Inhabitants of Marblehead*, 148 Mass. 326; *Thompson* v. *Boston*, 148 Mass. 387; but one is competent as a witness for this purpose, who has lived in the neighborhood, and knows the property, its advantages, surroundings, and its market value as compared with other lands: *Chicago etc. R. R. Co.* v. *Cooper*, 42 Kan. 561; *Central etc. R. R. Co.* v. *Andrews*, 37 Kan. 162; *Northeastern etc. R. R. Co.* v. *Frazier*, 25 Neb. 54; compare *Rees* v. *Schuylkill etc. R. R. Co.*, 135 Pa. St. 629.

Other Evidence of Damages. — The benefit accruing from a proposed improvement is inadmissible as an element of the value of the land: *Land Co.* v. *Neale*, 88 Cal. 50. The average monthly profits of the preceding year may be admitted in evidence to show the loss which might occur to the land-owner from a suspension of business during the time necessary to move to another place of business: *Atchison etc. R. R. Co.* v. *Schneider*, 127 Ill. 144. The market value before and after the condemnation cannot be ascertained by sales, under special circumstances, of other property similarly situated. *Curtin* v. *Railroad Co.*, 135 Pa. St. 20; or from evidence of the rental value of property which is not similarly situated or not in the same vicinity: *Huntington* v. *Attrill*, 118 N. Y. 366; *Atchison etc. R. R. Co.* v. *Schneider*, 127 Ill. 144. Nor is evidence admissible as to the value of only a part of the tract: *Schuylkill etc. R. R. Co.* v. *Stocker*, 128 Pa. St. 233; nor of extra hazard to the land-owner's dwelling from fire by reason of its nearness to the railroad: *Fore* v. *Western etc. R. R. Co.*, 101 N. C. 526.

Subsequent Damages, Compensation for, Condemnation having been Made. — All damages, present and prospective, arising from the appropriation of land for public use must be recovered in one action: *Indiana etc. R'y Co.* v. *Allen*, 113 Ind. 308; *Townsend* v. *Paola*, 41 Kan. 591; *White* v. *Chicago etc. R'y Co.*, 122 Ind. 317; *Bell* v. *Norfolk etc. R. R. Co.*, 101 N. C. 21; as successive actions cannot be maintained for that purpose: *Sherlock* v. *Louisville etc. R'y Co.*, 115 Ind. 22; *Texas etc. R'y Co.* v. *Meadows*, 73 Tex. 32; *White* v. *Chicago etc. R'y Co.*, 122 Ind. 317. Trespass is the remedy for independent acts of trespass committed subsequent to condemnation: *Leavenworth etc. R'y Co.* v. *Usher*, 42 Kan. 637; *Rome etc. C. Co.* v. *Jennings*, 85 Ga. 445.

Injury to Property not Taken. — A land-owner is entitled to have included in the assessment of damages for the taking of his property under the right of eminent domain such damages as will compensate him for injuries to lands adjoining those actually condemned for public use: *Hendrick* v. *Carolina etc. R. R. Co.*, 101 N. C. 617; *County of Chester* v. *Brower*, 117 Pa. St. 647; *Chaplin* v. *Highway Comm'rs*, 129 Ill. 651; *Roushlange* v. *Chicago etc. R'y Co.*, 115 Ind. 106; *Knoll* v. *New York etc. R'y Co.*, 121 Pa. St. 467. But the right of action for consequential damages to property injured but not taken for railroad purposes accrues when the road is constructed, not when it is located: *Pennsylvania etc. R. R. Co.* v. *Ziemer*, 124 Pa. St. 560;

Pond v. *Metropolitan etc. R'y Co.*, 112 N. Y. 186. The jury cannot take into consideration anything as an element of damages which is remote, imaginary, or speculative: *Kiernan* v. *Chicago etc. R'y Co.*, 123 Ill. 188. The burden of proof in such cases is upon the property owner: *Chicago etc. R'y Co.* v. *Phelps*, 125 Ill. 482.

On the same principle, owners of property abutting upon streets or public highways, though not owning the fee in such streets or highways, when railroads or other public improvements are built upon them, are entitled to compensation for damages sustained through the establishment and maintenance of such improvements: *Lake Erie etc. R'y Co.* v. *Scott*, 132 Ill. 429; *Taylor* v. *Bay City etc. R'y Co.*, 80 Mich. 78; *Denver etc. R'y Co.* v. *Barealouz*, 15 Col. 290; *Campbell* v. *Metropolitan etc. R. R. Co.*, 82 Ga. 321; *Thompson* v. *Pennsylvania R. R. Co.*, 51 N. J. L. 42; *Chicago etc. R'y Co.* v. *Hazels*, 26 Neb. 364; *McQuaid* v. *Portland etc. R'y Co.*, 18 Or. 237; *Enos* v. *Chicago etc. R'y Co.*, 78 Iowa, 28; *Kansas etc. R'y Co.* v. *McAfee*, 42 Kan. 239.

INTERNATIONAL AND GREAT NORTHERN RAILWAY COMPANY *v.* KERNAN.

[78 TEXAS, 294.]

MASTER AND SERVANT — DUTY OF MASTER — NEGLIGENCE OF SERVANT WHEN NEGLIGENCE OF MASTER. — A railway company is bound to furnish safe machinery and appliances for use by its employees, and a failure to use ordinary and reasonable care in this respect makes it liable for injuries to its servants caused by such neglect; nor can the company relieve itself of this duty by charging its servants with its performance. The neglect of such servant is the neglect of the master.

MASTER AND SERVANT — NEGLIGENCE OF SERVANT WHEN NEGLIGENCE OF MASTER. — The negligence of a car inspector is the negligence of the railway company, in respect to a brakeman in its employ injured while in the performance of his duty by a defective car and coupling apparatus; and it is immaterial that the defective car used by the company belonged to another company.

ACTION to recover for personal injuries caused by the negligence of a railway company, and inflicted upon a brakeman in its employ. Verdict and judgment for the plaintiff, Kernan, and the defendant railway company appeals.

Gould, Camp, and Robertson, for the appellant.

John M. Duncan and J. J. Rice, for the appellee.

COLLARD, J. Appellee, employed as a brakeman, while in the performance of his duty uncoupling cars in appellant's railroad yard in San Antonio, had two fingers on his right hand mashed off. The cause of the injury was a defect in the car and the coupling apparatus. Appellant, by several assignments of error arising from the refusal of the court to give

special instructions asked by defendant, insists that if the injury resulted from the negligence of its car inspector in failing to report the car in bad order for repairs, the inspector being a fellow-servant of plaintiff, the company would not be liable.

The rule is, that a railway company is bound to furnish safe machinery and appliances for use by its employees in operating its road, and if ordinary and reasonable care is not exercised by the company to do this, it would be responsible for injuries to its servants caused by such neglect. The company cannot relieve itself of this duty by charging its servants with its performance. The neglect of the servant to whom the company intrusted such duties is the neglect of the master: *Galveston etc. R'y Co.* v. *Farmer*, 73 Tex. 85, and authorities cited; *Houston etc. R'y Co.* v. *O'Hare*, 64 Tex. 600; *International etc. R'y Co.* v. *Bell*, 75 Tex. 53. The fact that the defective car belonged to another road was immaterial. It was the duty of the company to use the same care in protecting its employees that it would have used if the car had been its own, and if the danger of the service was thereby increased, to warn the brakeman: *Missouri etc. R'y Co.* v. *White*, 76 Tex. 103; 18 Am. St. Rep. 33.

Appellant requested the court to charge the jury that if the injury was caused by the carelessness of the engineer in backing the train, the negligence would be that of a fellow-servant, and defendant would not be liable. The court gave in the general charge a similar instruction embodying the same principle, and it was not necessary or proper to repeat it by giving the requested charge. The law of contributory negligence as applicable to the case was given to the jury in its general charge, which dispensed with the necessity of giving the special charge asked by the defendant on the same subject. Besides this, the charge asked could not be given, because it contained the oft-repeated illegal proposition insisted on by defendant, — that if the injury resulted from the negligence of the car inspector, the defendant would not be liable. On this account alone the instruction could not have been given.

We find no error in the trial of the case or in the judgment of the court below, and conclude it ought to be affirmed.

MASTER AND SERVANT. — The master must furnish safe machinery and appliances to his servants: *Chicago etc. R'y Co.* v. *Roesch*, 126 Ind. 446; *Union P. R'y Co.* v. *Fray*, 43 Kan. 750; *Dandie* v. *Southern P. R. R. Co.*, 42 La. Ann. 686; *Bomar* v. *Louisiana etc. R. R. Co.*, 42 La. Ann. 983; *Carroll* v. *Williston*, 44 Minn. 287; *Johnson* v. *St. Paul etc. R'y Co.*, 43 Minn. 53; *Snowberg* v.

Nelson-Spencer P. Co., 43 Minn. 532; *Ford* v. *Lake Shore etc. R'y Co.*, 124 N. Y. 493; *Rima* v. *Rossie Iron Works*, 120 N. Y. 433; *Trainor* v. *Phila. etc. R. R. Co.*, 137 Pa. St. 149; *McCombs* v. *Pittsburgh etc. R'y Co.*, 130 Pa. St. 182; *Bier* v. *Standard Mfg. Co.*, 130 Pa. St. 447; *N. & W. R. R. Co.* v. *Jackson*, 85 Va. 489; and this is a duty which cannot be delegated to another so as to relieve the master from responsibility: *Morton* v. *Detroit etc. R. R. Co.*, 81 Mich. 423; *Lyttle* v. *Chicago etc. R'y Co.*, 84 Mich. 289. See also *Titus* v. *Bradford etc. R. R. Co.*, 136 Pa. St. 618, and note; *Richmond etc. R. R. Co.* v. *Williams*, 86 Va. 165; 19 Am. St. Rep. 876, and note.

ST. LOUIS, ARKANSAS, AND TEXAS RAILWAY COMPANY *v.* MCKINSEY.

[78 TEXAS, 296.]

NEGLIGENCE — PROXIMATE CAUSE — LOSS OF HORSES FROM BURNING PASTURE FENCE. — Where a railway company negligently burns a pasture fence, whereby horses escape and become lost to the owner, the company is liable to him for their value, notwithstanding its ignorance of the fact that the horses had been recently brought from a remote distance, and placed in the pasture. The destruction of the fence was the proximate cause of the loss of the horses.

JUDGMENT, WHEN PASSES TITLE. — A judgment against a defendant for the value of horses which have strayed and become lost by his negligence, of itself, when paid, passes title to the horses to him, without any provision to that effect in the judgment.

Perkins, Gilbert, and Perkins, for the appellant.

ACKER, P. J. E. A. McKinsey purchased two horses on the thirteenth day of November, 1887, then recently driven from southwest Texas, and put them in his pasture, through which the St. Louis, Arkansas, and Texas Railway Company in Texas operated its railroad. Three days thereafter the railway company negligently set fire to the pasture fence, and destroyed it, and the horses escaped. After several months' diligent search, through Hopkins and adjacent counties, McKinsey failed to find his horses, and brought this suit against the railway company to recover their value.

The trial without a jury resulted in judgment for plaintiff for $150, the alleged value of the horses, and the railway company appealed.

By the first assignment of error, the appellant complains that the court erred in its conclusion of law that the destruction of the pasture fence was the proximate cause of the loss of the horses.

It is not denied that the fence was destroyed by the negli-

gence of the defendant, nor that the horses thereby escaped, but it is contended that the court having failed to find that appellant "had any notice of the character or kind of horses in the pasture," it would not be liable for damages resulting from the loss of the horses in consequence of their having been recently driven from a remote part of the state.

The general rule is: "When a defendant has violated a duty, he should be held liable to every person injured, whose injury is the natural and probable consequence of the misconduct, and that the liability extends to such injuries as might reasonably have been anticipated, under ordinary circumstances, as the natural and probable result of the wrongful act": *Seale* v. *Gulf etc. R'y Co.*, 65 Tex. 278; 57 Am. Rep. 602.

As to what character of intervening act will break the casual connection between the original wrongful act and the injury, and thereby relieve the wrong-doer of liability for the injury, it is said: "If the intervening cause and its probable or reasonable consequences be such as could reasonably have been anticipated by the original wrong-doer, the current of authority seems to be that the connection is not broken": *Seale* v. *Gulf etc. R'y Co.*, 65 Tex. 278; 57 Am. Rep. 602.

We think it should be conclusively presumed that the defendant had notice that the plaintiff would use the pasture for all purposes to which such property is adapted, and we think that it might have been reasonably anticipated that he would put into it stock that would be likely to stray off but for the fence. Such was the use that plaintiff was making of the pasture in putting the horses into it. Having purchased the horses, the natural and ordinary disposition of them was to put them in the pasture. The fact that they had been driven from a remote quarter may or may not have been instrumental in their loss; but certain it is that if the fence had not been destroyed they would not have had opportunity to indulge their propensity to wander off. We do not think that the court erred in the conclusion that the destruction of the fence was the proximate cause of the loss of the horses.

The second and only other assignment of error presented is: "The court erred in rendering judgment for the full value of the horses without retaining title to them, or by some other proper order protecting the appellant in the event the horses are found," etc.

When the appellant pays the judgment, the title to the horses passes to it by operation of law, independent of any

such provision in the judgment, and relates back to the date of the judgment, since which time the horses have, in contemplation of law, belonged to the defendant: Freeman on Judgments, sec. 237.

We find no error, and are of opinion that the judgment of the court below should be affirmed.

NEGLIGENCE — PROXIMATE CAUSE. — Upon the question of proximate cause, with reference to fires started by a railroad company, see *Haverly* v. *State Line etc. R. R. Co.*, 135 Pa. St. 50; 20 Am. St. Rep. 848, and note.

JUDGMENT. — EFFECT OF A JUDGMENT TO TRANSFER TITLE: See *Woolley* v. *Carter*, 7 N. J. L. 85; 11 Am. Dec. 521, and particularly note 523–528; *Acheson* v. *Miller*, 2 Ohio St. 203; 59 Am. Dec. 663, and note.

TEXAS AND PACIFIC RAILWAY COMPANY *v.* ADAMS.

[78 TEXAS, 372.]

RAILWAY AND RECEIVER. — TO SUPPORT A JUDGMENT AGAINST A RAILROAD COMPANY, in an action commenced against its receiver, and continued against the company after his discharge, the facts which make the company liable for losses while its road was in the hands of the receiver must be alleged and proved.

COMMON CARRIERS — RULE REQUIRING NOTICE OF LOSS — REASONABLENESS OF QUESTION FOR JURY. — Whether or not a stipulation in a bill of lading, that "claims for loss or damages must be presented to the delivering line within thirty-six hours after the arrival of the freight," is reasonable is a question for the jury, under all the circumstances of the case.

COMMON CARRIERS — POWER TO LIMIT LIABILITY FOR LOSS. — A stipulation in the contract of carriage limiting the liability to the carrier by whom the damage is occasioned is valid and binding as to connecting carriers, and proof by a carrier that damage did not occur while the goods were in its charge exonerates it from liability.

COMMON CARRIERS — CONNECTING LINES — PRESUMPTION AS TO WHERE LOSS OCCURRED. — Where goods have been transported by successive carriers, and damaged subsequently to shipment, it is presumed, in the absence of evidence, that the damage was caused by the last carrier; but he may overcome this presumption by evidence to the contrary.

George F. Burdett, for the appellant.

HENRY, A. J. This suit was brought by the appellee to recover damage to her wearing apparel and household goods.

The suit was originally brought against John C. Brown, as receiver of the Texas and Pacific Railway Company, and the petition charged that the damage to the property occurred while he was in possession of and operating said road as such receiver.

By an amended petition, plaintiff charged that subsequent

to the wrong done her, the defendant Brown was discharged from the receivership, and that all property and funds in his hands at the date of his discharge were turned over to said corporation.

The railroad company was by amendment made a party defendant, and appeared and answered.

The cause was discontinued as to the defendant Brown.

A judgment was rendered against the railroad company.

The petition showed that Brown was receiver under the appointment of a court that had jurisdiction to make it.

If facts existed making the railroad company liable for the payment of losses that occurred while it was being operated by the receiver, they were neither alleged nor proved.

For this cause, the judgment must be reversed.

The bill of lading contained a stipulation to the effect that "claims for loss or damages must be presented to the delivering line within thirty-six hours after the arrival of the freight." The testimony showed that plaintiff's residence was within a few hundred yards of the depot at which the freight was received; that she received it on Saturday afternoon, and did not open the trunk and box in which the goods were packed until the following Monday morning; and that she was sick during the interval.

The court, we think, fairly and correctly submitted to the jury the question whether the stipulation with regard to the time within which the claim was required to be made was a reasonable one.

It was proper to submit that issue to the jury instead of its being decided as a question of law by the court, as appellant contends it should have been.

The goods were shipped at Bowling Green, Kentucky, upon the Louisville and Nashville railroad, and a through bill of lading was given by that railroad to the point of destination on the Texas and Pacific railroad.

Another assignment of error reads as follows: "The court erred in failing to charge the law upon all of the issues, in this: Under the contract of shipment or bill of lading it is provided, among other things, as follows, to wit: 'That in case of damage or delay, that company alone shall be held answerable therefor in whose actual custody the freight may be at the time of the happening of such delay or damage'; and there was no proof showing that any damage or delay accrued whilst appellee's goods were in the possession of John C

Brown, who was operating and controlling the line of the Texas and Pacific Railway Company at the time appellee claims the injury occurred, and the court gave no charge to the jury upon this portion of said contract."

There was no evidence introduced showing on what road the alleged damage was done. We think that the stipulation in the contract limiting the liability to the carrier by whom the damage was occasioned was a binding one, under the circumstances of this case, and if the defendant railroad company shows that the damage did not occur while the goods were in its charge, it should have the benefit of a charge to that effect.

When it is made to appear that freight transported by successive carriers has been damaged subsequent to its shipment, and the evidence fails to show on what particular line the injury occurred, there exists a presumption that it was through the fault of the last carrier: Schouler on Bailments, 526.

The judgment is reversed, and the cause is remanded.

CARRIERS OF GOODS. — A carrier may by contract limit its liability for loss by stipulating that the shipper shall not maintain an action against it after forty days shall have elapsed from the time when the cause of action arose, though such time is shorter than the statute of limitations: *Gulf etc. R'y Co.* v. *Trawick*, 68 Tex. 314; 2 Am. St. Rep. 494, and note. A carrier may by contract limit its common-law liability as insurer of goods shipped over its road, but cannot by contract free itself from responsibility for any loss or damage occasioned by its own negligence: *Witting* v. *St. Louis etc. R'y Co.*, 101 Mo. 631; 20 Am. St. Rep. 636, and note; *Richmond etc. R. R. Co.* v. *Payne*, 86 Va. 481; *Railway Co.* v. *Manchester Mills*, 88 Tenn. 653. Words in the contract of a carrier limiting its liability will not be interpreted so as to exempt it from liability for negligence, when they can be given any other construction: *Kenney* v. *New York etc. R. R. Co.*, 125 N. Y. 422. As to the burden of proof in actions for losses, when there exists a contract limiting the carrier's liability, see *Witting* v. *St. Louis etc. R'y Co.*, 101 Mo. 681; 20 Am. St. Rep. 636, and note.

CONNECTING CARRIERS — PRESUMPTION AS TO WHERE LOSS OCCURRED. — The presumption arises that perishable goods shipped in good order continue in that condition when in the hands of the connecting carrier, and the burden is upon him to show that they were damaged when received by him: *Beard* v. *Illinois C. R'y Co.*, 79 Iowa, 518; 18 Am. St. Rep. 381. The action for loss or damage will lie against the carrier in whose custody the goods were when damaged or lost: *International etc. R'y Co.* v. *Tisdale*, 74 Tex. 9.

CONNECTING CARRIERS. — Contracts made by the first carrier, in the absence of its authority to bind connecting carriers, are not binding upon the latter: *Fort Worth etc. R'y Co.* v. *Williams*, 77 Tex. 121; *Mt. Pleasant etc. Co.* v. *Cape Fear etc. R. R. Co.*, 106 N. C. 207; *Georgia R. R. & B. Co.* v. *Murrah*, 85 Ga. 344.

PHILLIPS v. HERNDON.

[78 TEXAS, 378.]

PLEADINGS — VARIANCE. — A complaint alleging that a vendor obligated himself to convey land "in fee-simple by warranty deed" may be supported by title bonds reciting that he would convey the land "by good and valid deed or deeds in common form." This does not constitute a variance, as a good and valid deed in common form is, in legal effect, a warranty deed.

VENDOR AND VENDEE — BREACH OF CONTRACT TO CONVEY LAND — MEASURE OF DAMAGES. — Where a vendor, under a contract to convey land, has voluntarily conveyed it to an innocent third person before the expiration of the contract, the measure of damages against the vendor and in favor of the vendee under the contract upon payment of the purchase price is the value of the land at the time it was conveyed to such third person.

VENDOR AND VENDEE — MINORS — ADMISSIBILITY OF DECLARATIONS AGAINST. — In an action by the guardian of minor orphan children of a vendee against the vendor under a contract for the sale of land, declarations made by the grand-parents of such minors after the death of the parents, and without any authority to bind their interests, are inadmissible as against them.

VENDOR AND VENDEE — CONTRACT FOR SALE OF LAND — RESCISSION. — Where the vendor under a contract for the sale of land has received part of the purchase-money from the vendee, who has taken possession under the contract, the vendor cannot rescind without notice to the vendee of his intention to do so.

VENDOR AND VENDEE — CONTRACT FOR SALE OF LAND — WAIVER OF RIGHT OF RESCISSION. — Where a vendor under an executory contract for the sale of land has received payments from the vendee after default in failing to pay the purchase-money notes at maturity, he thereby waives his right of rescission.

PAYMENTS — APPLICATION OF. — In respect to the appropriation of payments made by a debtor to a creditor who holds more than one debt against him, the debtor may generally appropriate payments; and if he does not, the creditor may; and if neither appropriates them, the law will make the application according to the justice of the case. The creditor cannot, however, make such application as would, under the circumstances, be inequitable and unjust to the debtor.

White and Edwards, for the appellant.

George H. Gould and W. S. Herndon, for the appellees.

ACKER, P. J. On the fifteenth day of September, 1875, W. S. Herndon sold to James Moseley five acres of land for the consideration of one hundred dollars in gold, for which Moseley executed his promissory note bearing interest from that date at ten per cent per annum and payable on the first day of January, 1876, and also paid to Herndon thirty dollars in currency, for which Herndon executed his receipt, to be credited on Moseley's note at its value in gold. Herndon

executed and delivered to Moseley a bond for title in the usual form, and Moseley went into possession, built a house upon the land, and resided there with his family until his death, in November, 1881.

In addition to the thirty dollars currency paid by Moseley at the time of his purchase, he made the following payments to Herndon: On the twenty-first day of November, 1877, Herndon receipted him for "twenty dollars, to be credited on his land note." On the first day of December, 1877, thirty dollars in currency, which was receipted for, to be credited on the note. December 17, 1878, Herndon made a statement showing balance of $46.90 due him by Moseley, and on that day he credited the statement with the sum of $30 then paid by Moseley, reducing the balance due to $16.90.

On the fourteenth day of January, 1879, Herndon sold to Moseley another tract of five and eight tenths acres of land for the consideration of one hundred dollars in gold, for which Moseley executed his promissory note, due at one day after date, with interest from date at ten per cent per annum, and Herndon executed and delivered his bond for title to Moseley, and Moseley took possession of this tract also. On the fourth day of October, 1881, Moseley paid Herndon eighteen dollars, and on the first day of December, 1882, Herndon collected thirty-five dollars due to Moseley for a pony he had sold in 1881.

When Moseley died, in November, 1881, he left a wife and four minor children living on the land. His wife died in June, 1882, and her parents, Perry and Polly Phillips, took charge of the children and removed them from the land to their home to care for them, and took possession of the land.

On October 15, 1883, Herndon made a statement to Phillips and wife showing balance of $173.75 due him on the two sales made to Moseley, and on that day Herndon indorsed on each of the bonds for title that the sales made to Moseley were canceled, and that he had that day sold the lands to Perry Phillips for the consideration of $173.75, upon which Phillips then paid him $3.75.

On the tenth day of December, 1887, Herndon sold the lands to F. R. Allen, who took possession thereof.

Perry Phillips qualified as guardian of the minor children of James Moseley, and, as such, brought this suit on the twenty-seventh day of April, 1888, against Herndon and Allen for specific performance of the contracts made by Hern-

don with Moseley, alleging payment of the purchase-money by Moseley, or to recover the value of the land from Herndon if it was found that Allen was a good-faith purchaser from Herndon, and alleged that the value of the land was $150 per acre at the time Herndon sold to Allen. Plaintiff also prayed for general relief.

The defendants answered general denial, limitation, and pleaded cancellation of the sales to Moseley for failure to pay purchase-money. Allen pleaded that he was an innocent purchaser.

The trial, without a jury, resulted in judgment for the defendants, and plaintiff appealed.

The plaintiff offered in evidence the bonds for title, to which the defendants objected, "for the reason that the same varied from and did not correspond with the allegations of the petition."

The objections were sustained, and the first and second assignments of error relate to these rulings.

The allegations of the petition descriptive of the bonds are as follows: "That on said fifteenth day of September, 1875, said W. S. Herndon, being desirous of disposing of said above-described land, entered into an agreement with James Moseley, the ancestor of plaintiff's said wards, for the sale of said lands to him, the said James Moseley, which agreement was reduced to writing, and signed by said W. S. Herndon, and delivered on the day it bears date, to wit, on September 15, 1875, wherein said Herndon stipulated and agreed with said Moseley to convey to him said above-described tract of land in fee-simple by warranty deed, upon payment of a promissory note executed on said September 15, 1875, by said James Moseley for one hundred gold dollars, with ten per cent interest from date, due at Tyler, Texas, on January 1, 1876."

The bond of date January 14, 1879, was described in substantially the same way. The objection does not designate in what the alleged variance consists, and we are unable to discover it.

It is alleged that Herndon obligated himself to convey the land "in fee-simple by warranty deed," while the bonds offered in evidence recite that he would convey the lands "by a good and valid deed or deeds in common form," but this constitutes no variance, for an obligation to make "a good and valid deed in common form" binds the obligor to execute a warranty

deed, and the petition correctly declared the legal effect of Herndon's obligations: *Vardeman* v. *Lawson*, 17 Tex. 11.

It is true that it appears from the bill of exceptions that the bond of September 15, 1875, described the note given by Moseley of that date as maturing January 1, 1879, instead of January 1, 1876, as alleged in the petition, but the receipt given by Herndon for the thirty dollars paid by Moseley on the day of the date of both the bond and note recites that the note matured on the first day of January, 1876. Herndon testified that it became due on that date, and indeed all of the evidence upon that point went to show that the note of September 15, 1875, matured January 1, 1876, as alleged in the petition. We therefore conclude that "1879," written in the bill of exceptions, is a clerical error, and that there is no variance between the allegations and evidence offered.

We think the first and second assignments of error are well taken, and that the court erred in excluding the bonds.

The third assignment of error is: "The court erred in excluding the evidence offered by plaintiff to prove the value of the land at the time defendant Allen took possession of it, said evidence being pertinent, and plaintiff having alleged the value of said land and prayed for judgment for said value in case he should fail to recover the specific land itself."

There were two separate and entirely distinct contracts entered into between Herndon and Moseley, either of which Moseley had the right to enforce specific performance of as against Herndon upon proof of performance by Moseley of his part of the contract. If after performance by Moseley, Herndon, by his voluntary act, placed it beyond his power to make title to the land as stipulated in his bond, he thereby became liable to Moseley for such damages as were the direct and natural result of his failure to comply with his obligations. There has been much contrariety in the decisions of the courts as to the correct measure of damages in such cases, but we believe that equity and the weight of authority sustains the view that in executory contracts of the character involved in this case adequate compensation for the injury done should be recoverable, where the vendor by his voluntary act deprives himself of the ability to perform his contract.

We are aware that the case of *Hall* v. *York*, 22 Tex. 648, following *Sutton* v. *Page*, 4 Tex. 142, seems to hold the contrary doctrine; for it is there said "that where the vendor of

land is not able to make title, the vendee's measure of damages is the purchase-money and interest, and nothing more." But that case, like the case of *Sutton* v. *Page*, 4 Tex. 142, was not a suit for specific performance or to recover damages for breach of trust by the vendor. *Hall* v. *York*, 22 Tex. 643, was a suit to recover the penalty fixed by the bond for title, which was a much larger sum than the money paid, and, like the case of *Sutton* v. *Page*, 4 Tex. 142, was simply an action on the personal covenant in the bond. In both of those cases it was held that the measure of damages was the money paid, with interest, unless other damages are specially alleged and proved. We do not think those cases are analogous to this.

In the case of *Hopkins* v. *Lee*, 6 Wheat. 109, the court said: "The rule is settled in this court that in an action by the vendee for a breach of contract on the part of the vendor for not delivering the article, the measure of damages is its price at the time of the breach. The price being settled by the contract, which is generally the case, makes no difference, nor ought it to make any; otherwise the vendor, if the article has risen in value, would always have it in his power to discharge himself from his contract, and put the enhanced value in his own pocket; nor can it make any difference in principle whether the contract be for real or personal property, if the lands, as is the case here, have not been improved nor built on. In both cases the vendee is entitled to have the thing agreed for at the contract price, and to sell it himself at its increased value." See also *Kirkpatrick* v. *Downing*, 58 Mo. 32; 17 Am. Rep. 678.

In this case, plaintiff did not seek to recover anything for improvements put upon the land, but only the value of it at the time of its appropriation by Herndon, in the event specific performance could not be had. The land was sold by Herndon to Moseley at twenty dollars per acre, and the petition alleged it to be of the value of $150 per acre at the time it was sold by Herndon to Allen.

If Moseley fully performed his part of either of the contracts by paying the purchase-money, the superior equitable title vested in him, and Herndon held the legal title in trust for him, and upon breach of that trust by voluntary conveyance of the legal title to another, Herndon became liable to Moseley for such damages as resulted directly therefrom, we think certainly to the extent of the value of the land at the time it

was so appropriated; and we think the court erred in excluding the evidence offered to prove such value.

The fourth assignment of error is: "The court erred in admitting, over objection of plaintiff, the evidence offered by defendants as to transactions and conversations had by defendant Herndon with Perry Phillips and Polly Phillips, in the year 1883, as shown by plaintiff's bill of exceptions No. 4."

The objection to this evidence was upon the ground that "it was immaterial, and could not affect the rights of plaintiff's wards."

We think the objection was good, and should have been sustained. When Moseley died, whatever rights and interest he had in the land descended to and vested absolutely in his widow and minor children. At the time of the transactions between Herndon and Perry Phillips and his wife, in 1883, Moseley's widow was also dead, and the minor children alone owned whatever interest their parents had acquired in the land. There was no one authorized to bind them, or affect their interest by any agreement, and their rights were not affected by the transactions between Herndon and their grand-parents, Perry and Polly Phillips.

The fifth assignment of error is: "The court erred in rendering judgment for defendants, and in not rendering judgment for plaintiff, it being shown that at least the five acres of land bargained for by James Moseley on September 15, 1875, had been fully paid for, and that F. R. Allen was not a purchaser in good faith."

The court found, as a conclusion of law, that "the plaintiff has mistaken his remedy; the land having been sold to Allen by Herndon without notice, plaintiff cannot recover the land or its value, but his recovery would be the penalty on the bond, to wit, one hundred dollars, with interest."

From what we have already said it will be seen that we understand this suit to be on the bonds for specific performance only in the first instance, and secondarily against Herndon to recover damages for breach of trust in voluntarily transferring the legal title to Allen, and thus placing it beyond his power to perform his contract after the superior equitable title had vested in Moseley by payment of the purchase-money. We see no reason why the plaintiff cannot maintain the suit in this way. If Allen was an innocent purchaser, then specific performance could not be decreed against Herndon; and if the superior title had vested in Moseley, the plaintiff could either

sue upon the bond for purchase-money paid and interest, or bring his suit, as we understand him to have done, to recover damages against Herndon for breach of trust.

Herndon having received from Moseley at least a part of the purchase-money for the lands, and Moseley having taken possession under his contracts of purchase, Herndon could not rescind the sales to him without notice of his intention to do so; and Herndon having received payments on the purchase-money after default by Moseley in failing to pay the purchase-money notes at maturity, he thereby waived his right of rescission: *Kennedy* v. *Embry*, 72 Tex. 390; *Moore* v. *Giesecke*, 76 Tex. 548; *Tom* v. *Wollhoefer*, 61 Tex. 281.

At the time Herndon attempted to rescind the sales to Moseley, after the death of both Moseley and his wife, there was no one to whom notice of his intention to rescind could be given, and there was therefore no rescission effected.

Herndon testified, without objection, that "about July 23, 1881, Moseley and myself had a settlement of all matters between us; he had done work for me, and I had advanced considerable money to pay his hands and for supplies, and he fell in my debt $183. This was then treated by Moseley and myself as balance due me."

In regard to the eighteen dollars paid by Moseley to Herndon on October 4, 1881, Herndon testified "that in the fall of 1881, I think, I let him have some money, but how much I cannot say. He was to settle it out of his service upon the railroad, but died, and failed to pay anything, except the eighteen dollars, October 4, 1881; this may or may not have settled the small amounts I let him have after July 23, 1881, but I cannot say."

Herndon also testified that "some time before Moseley died he sent me a note that he had sold the pony to Schoof for thirty-five dollars, and to please collect the amount, and give him credit on the debts he owed me."

There was no other evidence bearing upon the question of appropriation of the money received by Herndon from Moseley after the second bond for title was executed, at which time, according to the statement made by Herndon on the 17th of December, 1878, Moseley owed him a balance of $16.90 on the first purchase, after having paid him $110, $80 of which was paid at the time of the purchase.

In respect to the appropriation of payments made by a

debtor to a creditor who holds more than one debt against him, the general rule is, that a debtor has the right to appropriate payments; and if he does not, the creditor may do so; and when neither appropriates them, the law will make the application according to the justice of the case: *Matossy* v. *Frosh*, 9 Tex. 612.

In *Stanley* v. *Westrop*, 16 Tex. 206, it is said: "It is admitted on all hands that the debtor has the absolute right to make the application, if he sees proper to exercise it. If he omits to do so, and it is left to the law to make it for him, it ought, it would seem, to be made in accordance with the presumed intention of the debtor." And we think it must be presumed that the debtor intended to apply it to the debt that would be most beneficial to him.

In *Taylor* v. *Coleman*, 20 Tex. 772, it is said: "The debtor having at the time of the sales made no specific designation of the proceeds, the plaintiffs were left to their election to apply the payment. But this did not vest them with the power to act capriciously, or to make such designation as would unreasonably operate to the prejudice of the defendant. At the civil law the creditor must regard himself as standing in the shoes of the debtor, and apply the payments to such debts as the debtor himself would have first discharged. But without affirming the principle to this extent, it is the rule of the common law that the creditor cannot make such application as would, under the circumstances, be inequitable and unjust to the debtor." See also *Bray* v. *Crain*, 59 Tex. 649.

Applying the rules and principles announced in the foregoing decisions to this case, we think the $18 paid by Moseley on the fourth day of October, 1881, should have been applied to the payment of the balance of $16.90 claimed by Herndon to be due on the first contract (especially so as it does not appear from the evidence what application Herndon made of it), and thereby perfect Moseley's title to the five acres first purchased. If the $18 was insufficient to pay the balance of $16.90, then so much of the $35 received by Herndon after Moseley's death as was necessary to pay off the balance of the $16.90 should be so applied. At the time Herndon received the $35, Moseley was dead, and could not direct its application. The law applied it for him to the liquidation of any balance that might be due on the purchase-money for the five acres first purchased, and upon which he had established the home for himself and family.

We are of opinion that the judgment of the court below should be reversed and the cause remanded.

VENDOR AND VENDEE — CONTRACTS FOR SALE OF LAND. — As to the measure of damages for a breach of a contract to convey realty, see note to *Pumpelly* v. *Phelps*, 100 Am. Dec. 467, 468. The measure of damages for a breach of a contract to convey realty on the part of the vendor is the fair market value of the land at the date of the breach: *Dikeman* v. *Arnold*, 71 Mich. 657.

VENDOR AND VENDEE — CONTRACTS OF SALE. — Where the vendor deeds the land to a third party prior to the time for the final consummation of the contract of sale, the vendee may treat the contract as rescinded, and may recover any purchase-money paid by him and interest thereon: *Wesner* v. *Aitcheson*, 65 Mich. 285. In such an action, however, defendant may show that his grantee orally promised to make a reconveyance of the property: *Damon* v. *Weston*, 77 Iowa, 259.

PAYMENTS, APPLICATION OF. — The debtor may designate the debt to which he wishes the payment applied; if he does not so designate, the creditor may make the application; but if neither makes it, the application will be made by the law in an equitable manner: *Murdock* v. *Clarke*, 88 Cal. 384; *Green* v. *Ford*, 79 Ga. 130; *Peterborough etc. Bank* v. *Hodydon*, 62 N. H. 302; *Bartel* v. *Mathias*, 19 Or. 483. The burden is upon the debtor to prove that he directed the application of a payment: *Thatcher* v. *Massey*, 26 S. C. 155. The debtor may by acquiescence estop himself to deny the application of a payment made by him: *Flarsheim* v. *Brestrup*, 43 Minn. 298. Compare *Frazier* v. *Lanahan*, 71 Md. 131; 17 Am. St. Rep. 516, and note.

BROWN *v.* WARNER.

[78 TEXAS, 543.]

RECEIVERS — AGENT OF COURT, AND NOT OF OWNER. — A receiver is generally only the agent of the court appointing him, with authority to take possession and control of the property in litigation, and is not the representative of its owner for the fulfillment of the latter's contracts, except in cases in which he has made the contract his own by some act of adoption.

RECEIVER OF RAILROAD — NOT BOUND BY COMPANY'S CONTRACT. — A receiver placed in charge of a railway to hold and operate it is not bound to carry out the contract of the company with a third person to maintain a switch on the latter's land; and if the receiver discontinues the switch, the only remedy is against the company for a breach of the contract.

Whitaker and Bonner, for the plaintiffs in error.

H. Chilton, for the defendant in error.

GAINES, A. J. The appellee brought this suit against the appellants as receivers of the Texas and Pacific Railway Company, alleging in his petition that in 1874 he made a contract

with that company to the effect that in consideration of his agreement to grade and furnish ties for a switch on the company's railroad at a point known as Warner's Station, it would furnish the iron, and complete and permanently maintain such switch at that point for his benefit for shipping purposes; that the switch was constructed in accordance with the contract, and maintained until the year 1887; but that in December, 1885, the defendants were appointed receivers of the company's railroad by the United States circuit court for the northern district of Texas, and thereafter went into possession of the property, and continued to operate the same, and that on the nineteenth day of May, 1887, they removed the switch, over his protest, and thereby damaged him greatly by the consequent depreciation of his property. The property was specifically described, and consisted in timber-lands, timber privileges, saw-mills, storehouses, a stock of goods, etc., — all of which, as alleged, had been acquired at the time of the removal for the purpose of carrying on the business of sawing lumber for market, and was rendered greatly less valuable for want of any practicable means of placing the lumber upon the railroad at a point where it could be transported to market. The damages were specifically alleged, and, according to the allegations, amounted in the aggregate to the sum of $63,425.

A general demurrer to the petition was overruled, and that ruling is assigned as error.

The case made by the petition is an action against the receivers to recover damages for the breach of the company's contract. Neither the nature of the suit in which the receivers were appointed, the grounds for that appointment, nor the powers conferred upon them are disclosed by the petition. We may assume that the receivership has been ordered, and the appointment made in some equitable proceeding in which it has been deemed necessary for the court to take charge of the property in order to prevent its waste and the diversion of its income during the pendency of the suit. A receiver, as a general rule, is but the agent of the court that appoints him, with authority to take the possession and control of property the subject-matter of litigation, and is not the representative of its owner for the fulfillment of the latter's contracts, except in cases in which he has made the contract his own by some act of adoption: *Commonwealth* v. *Franklin Ins. Co.*, 115 Mass. 278.

The life of a railroad depends upon its active operation as a "going concern," and a receiver over it must necessarily exercise many of the powers of a proprietor in its management, and be subjected to a similar liability for his own official acts and those of his servants and agents. He is liable as receiver for his contracts made in his official capacity and for the torts committed by his servants and agents in the operation of the road. By reason of the liability incurred by the operation of so much machinery and the employment of so many men, it may seem upon first blush that their liability is defined by a different rule from that which prescribes the liability of receivers in ordinary cases. But the rule is the same. The receiver of the property of a railroad is no more the representative of the company than the receiver of the property of a natural person is the representative of such person. Let us suppose, then, that the proprietor of a cotton-gin has contracted to gin the cotton of his neighbor at a certain rate, and that before he has performed his contract the property is placed in the hands of a receiver, who is directed to operate it; can it be said that he is liable in damages should he refuse to comply with the contract? Clearly not. He is appointed, not to carry out the proprietor's contracts, but to manage and preserve the property. So the receiver of a railroad company is no more bound to do a particular thing which the company has contracted to do, than he is liable to pay a debt which the company has contracted to pay.

Let us then apply these principles to the case made by the plaintiff's petition. When the appellants were appointed receivers and placed in charge of the railway there was a contract existing between the railway company and the plaintiff for the maintenance of a switch at Warner's Station. That was purely a personal contract. The duty of the receivers was to hold and operate the railroad, and they were no more bound to carry out the company's contract to maintain the switch, than they were to discharge its obligations to pay money.

When in the management of the road they deemed it proper to remove the switch, and did remove it, the contract of the company was broken, and it was liable in damages for its breach. That the appointment and acts of the receivers do not absolve it from its liability to carry out its contract was decided in effect by this court in *Hunt* v. *Reilly*, 50 Tex. 99. If appellee was unable to recover damages of the company for its breach of the contract by reason of its insolvency, it is a

misfortune he has suffered doubtless in company with numerous other simple contract creditors. For the failure to perform the contract his cause of action was against the company, and it was not of that character which could be brought against the receivers without leave of the court: U. S. Stats. 1886–87, p. 554, sec. 3.

The authorities bearing directly upon the question under consideration are not numerous, but they are all, so far as we have been able to find, in accordance with the views we have expressed. The case of *Southern Express Co.* v. *Western etc. R. R. Co.*, 99 U. S. 199, was a bill in equity by the express company against the receiver of the railway company to compel the specific performance of a contract, made before the receiver's appointment, to carry freight for the complainant. In the opinion the court say: "The road is in the hands of a receiver in a suit brought by the bond-holders to foreclose their mortgage. The appellant has no lien. The contract neither expressly nor by implication touches that subject. It is not a license, as insisted by counsel. It is simply a contract for the transportation of persons and property over the road. A specific performance by the receiver would be a form of satisfaction or payment which he cannot be required to make. As well might he be decreed to satisfy appellee's demand by money as by the service sought to be enforced."

The same principle was recognized in *Commonwealth* v. *Franklin Ins. Co.*, 115 Mass. 278, and in *In re Brown*, 3 Edw. Ch. 384, and in *Ellis* v. *Boston etc. R. R. Co.*, 107 Mass. 1. In the case last cited the court say: "The receivers are officers of the court for this purpose [that of preserving the property], and act under its direction and control. They continue the operation of the road and conduct its business, because this is essential to its proper preservation. They may fulfill the contracts of the corporation so far as beneficial. They may not pay its debts or fulfill contracts which are burdensome or tend to diminish the value of property under their control, unless such contracts are charged as encumbrances on the property or are necessary to its proper preservation and security."

In the case of *Howe* v. *Harding*, 76 Tex. 17, 18 Am. St. Rep. 17, the owner of land granted the railway company a right of way over his land in consideration of the company agreeing to take water from a spring belonging to him at a certain stipulated price. A receiver appointed over the property of the company continued to use the right of way, but refused to carry

out the contract to take and pay for the water. It was held that there was but one contract, and that since the receiver adopted it as to the right of way, he became bound for its fulfillment as to the water. It was held also that a lien existed upon the right of way for securing the payments for the water, that being deemed the real consideration for the grant of the easement. The court declined to decide whether or not the receiver was bound to carry out the contract to take and pay for the water had so much of the agreement stood as an independent contract.

We conclude that the court erred in overruling the demurrer, and therefore the judgment is reversed and the cause remanded.

RECEIVERS — AGENTS OF COURT. — Receivers are mere agents of the courts appointing them, and must obey the orders given them by such courts: *Herrick* v. *Miller*, 123 Ind. 304; *Spalding* v. *Commonwealth*, 88 Ky. 135; *Burroughs* v. *Bunnell*, 70 Md. 18; *First Nat. Bank* v. *Iron Works*, 60 Mich. 487. But a receiver empowered to take possession of and operate a railroad is in some sense the agent or representative of the railway company: *Bartlett* v. *Keim*, 50 N. J. L. 260; and its contracts may be continued in force against him: *Howe* v. *Harding*, 76 Tex. 17; 18 Am. St. Rep. 17, and note. Compare *Texas P. R'y Co.* v. *Johnson*, 76 Tex. 421; 18 Am. St. Rep. 60, and note.

HUFFMAN *v.* MULKEY.

[76 TEXAS, 556.]

VENDOR AND VENDEE — EXECUTORY CONTRACT FOR SALE OF LAND — RESCISSION — RIGHT OF VENDEE. — The right of a vendor to rescind, who has conveyed land by a deed on its face reserving a lien for the purchase-money, does not exist until the vendee is in default of payment under the contract; and prior to such time one to whom the vendee has conveyed is entitled to all the rights of his vendor, which cannot be affected by any transaction between the original vendor and his vendee after the latter has parted with his interest in the land.

VENDOR AND VENDEE — EXECUTORY CONTRACT FOR SALE OF LAND — RESCISSION — BURDEN OF PROOF. — Under an executory contract for the sale of land, the right of the vendor to rescind does not exist until the vendee is in default in payment of the purchase-money; and the burden of proof is on the vendor to show the fact giving a right to rescind, in a contest with a third person claiming to be a purchaser from the vendee before default.

DEEDS — RATIFICATION OF. — A party who recognises the validity of a deed made without his knowledge or consent thereby becomes a party to and is bound by it.

DEEDS — JOINT OWNERS — INTEREST OF, HOW DETERMINED. — The interests of joint owners of land, in the absence of some other controlling fact, is to

be determined by the proportion which the amount of purchase-money paid by each bears to the entire sum which was the consideration for the deed.

Templeton and Carter, and Wallace Hendricks, for the appellant.

M. D. Priest, for the appellees.

STAYTON, C. J. This is an action of trespass to try title, brought by W. A. Huffman against Sam Evans and the other defendants to recover an undivided half-interest in block 29, in the city of Fort Worth. The other defendants claim through conveyances from Sam Evans.

About August 23, 1871, Evans conveyed the block to Giles F. Parman, reserving in the face of the deed a lien for the purchase-money, which was wholly unpaid at the time deed was executed.

About June 19, 1875, Parman conveyed the block to Sam Evans and W. A. Huffman, who are parties plaintiff and defendant in this action, and this is the basis of Huffman's claim.

At the time conveyance last mentioned was made, Evans and Huffman were partners in mercantile business, and the deeds made by Evans to the other defendants were all subsequent to the conveyance from Parman to Evans and Huffman as well as to a deed made as a substitute for that deed, which, with its record, seems to have been destroyed in the burning of the court-house of Tarrant County. The substituted deed was recorded February 1, 1877, two days after its execution, which was before any of the conveyances were made by Evans to the other defendants.

The theory of the defense was, that Parman and Evans by parol agreement canceled the trade between them, and in support of that counsel for appellant thus states the evidence of Evans: —

"The purchase-money due me from Parman was never paid. I never had any settlement with him about it, except he went off and vacated the premises, and turned them over to me for the purchase-money and moved out west. He first moved out to Tandy's place. I knew nothing about the conveyance to Sam Evans and W. A. Huffman dated June 19, 1875, nor did I know anything about the conveyance made by him January 29, 1877. I don't remember when Parman vacated the land. It was some time between the years 1873 and 1877. Parman

built on the land. I furnished the lumber. In regard to the vendor's lien notes on this land, I don't know what became of them. I suppose they were burned up with the building and other books. Mr. Huffman had charge of all the books and business and was winding it up, paying off the debts of the business. By the papers of the house I mean the mercantile papers. I say I don't know where the notes were. I never delivered them up to Parman."

While this was not the exact language of the witness, it contains the substance of Evans's testimony so far as it goes, but he further stated that he never authorized any one to procure a deed from Parman to himself and Huffman.

Huffman contended that the block was bought for Parman by Evans and himself or for the firm; and after stating that he knew all about the transaction, and that he and Evans were partners, testified that "the consideration (for the conveyance) was in part a merchandise account and the remainder balance due by Parman as purchase-money on said lot of ground. I had authority to settle all store accounts. Captain Evans and I talked the matter over and decided that it was best to take the property, as Mr. Parman had nothing else to pay with. I think the store account was seven hundred dollars, and balance due on the purchase-money about eight hundred dollars, but can't be positive as to amount. I was acting as partner and on account of the firm; Evans knew of the transaction; the firm name was Evans and Huffman. I did not put any money into the said purchase from Parman; it was paid for with partnership assets, as stated above."

The evidence of the witness was taken by deposition.

There was some other evidence tending to show that Evans recognized the fact that Huffman had some interest in the block.

On the question of title the court instructed the jury as follows: "It is agreed in this case that the land in controversy was patented to M. T. Johnson, and by said Johnson's administrators conveyed to defendant Evans; that said Evans conveyed the same to G. F. Parman on credit, and that he reserved a lien for the payment of the purchase-money; and you are instructed that under the facts so agreed the superior title remained in said Evans until the payment of the purchase-money; and unless you further believe from the evidence that the deed subsequently make by the said Parman

to said Evans and plaintiff was made with the consent of said Evans, and if you believe from the evidence that upon failure to pay the same said Parman surrendered the possession of said land to the said Evans, you should find for the defendant. If, however, you believe from the evidence that said deed from Parman was made to said Evans and plaintiff Huffman with the knowledge and consent of said Evans, then the said deed would vest in the plaintiff title to one half of said land, and in that event you should find for him, the plaintiff, as against all the defendants, except the defendant Swartz, one half the land claimed by them respectively."

The right of a vendor who has conveyed land through a deed on its face reserving a lien for purchase-money to rescind is not an absolute right, even in cases in which the purchase-money has become due and remains unpaid, as may be seen by an examination of the many cases decided by this court.

The right of the vendor to rescind in such cases does not exist at all until the vendee has failed to pay purchase-money in accordance with the contract; and one to whom a vendee has conveyed is entitled to all the rights of his vendor, which cannot be affected by any transaction between the original vendor and his vendee after the latter has parted with his interest in the land.

The evidence does not show when the transaction between Evans and Parman occurred, which it is claimed operated a rescission of the contract between them, and is consistent with the fact that this may have occurred after Parman had conveyed to Evans and Huffman.

The evidence further fails to show when the notes executed by Parman matured, and under this state of facts in this action we think the charge was misleading, in that the jury must have understood from it that Huffman could not recover, unless he showed that the purchase-money had been paid or that the conveyance to Evans and himself was made with consent of the former.

If he bought without consent of Evans, and before Evans had right to rescind, or had in some lawful manner actually rescinded, no agreement subsequently made between Parman and Evans could defeat any right acquired by him through the deed from Parman to Evans and himself; and before Evans could hold the land by any superior right as a vendor, it would be incumbent on him to show a right to rescind, which, in

such a case, could not be proved, unless it was shown that the purchase-money was due and unpaid.

In *Kennedy* v. *Embry*, 72 Tex. 389, it was held that a vendor of land who had executed a deed to the purchaser and taken a mortgage to secure the purchase-money might sell to another and pass title to the land after all the purchase-money became due and remained unpaid. In that case no part of the contract had been performed by the purchaser; he had never been in possession, all the purchase-money was past due and unpaid, and the purchaser had abandoned the state.

A similar ruling was made in *Thompson* v. *Westbrook*, 56 Tex. 265.

In these cases the facts existed which entitled the vendors to rescind, but the cases push the application of the rules growing out of the holding that such contracts are executory in character to the utmost verge of propriety or reason; and the writer doubts the correctness of the holding, even in such cases, that rescission can, in any case in which a deed has passed, be made otherwise than by a writing or some decree of proper tribunal, if for no other reason, because it makes title to land to rest largely in parol, when the purpose of the statutes of fraud was to require such right to be evidenced in a different manner.

In *Dial* v. *Crain*, 10 Tex. 453, a parol rescission of an executory contract to convey land was set up, and in disposing of the case it was said: "This was a good and valid contract under the statute of fauds, and was proof that the land was sold by Vaughan to Crain. If so, then, Crain being the owner of the land, any contract for rescission would be as much obnoxious to the provisions of the statute of frauds, and would require the same evidence under the statute to set it up as was required for the sale between Vaughan and Crain. The charge asked treated the contract between Vaughan and Crain evidenced by the writing signed by Vaughan as a mere verbal contract, and such as could be rescinded verbally, without any reference to the provisions of the statute of frauds, and as if for that purpose inferior evidence could be received."

However this may be, all the cases deny to the vendor the right to rescind so long as the vendee is not in default.

In *Burgess* v. *Millican*, 50 Tex. 401, quoting from *Dunlap* v. *Wright*, 11 Tex. 597, 62 Am. Dec. 506, it was said: "When a mortgage for the payment of the purchase-money for land is executed simultaneously with the deed by which it is con-

veyed, the vendor has, until the purchase-money is paid or the mortgage foreclosed, the superior right, and if the vendor go into possession after the vendee has made default, he cannot be turned out by process of ejectment or trespass to try title, notwithstanding the claim for the purchase-money may be barred by the general law of limitations. The effect of the principles in these cases is, that the vendor's deed may be absolute, yet if a mortgage for the purchase-money be given back at the same time, the fee will absolutely remain in the vendor. The sale will be conditional, the ultimate right to the fee depending on the performance or non-performance of the conditions. If the purchase-money be paid, if the mortgage be satisfied, the seizure will be regarded as having been in the vendee *ab initio*, or from the date of purchase. If not paid, the vendor will, in the language of *Stow* v. *Tifft*, 15 Johns. 458, 8 Am. Dec. 266, be reseised free of the mortgage."

Under this the right to rescind does not exist until the vendee is in default, and to prove the fact giving this right rests on the vendor in a contest with a third person. If the notes executed by Parman were overdue, and he surrendered possession of the land to Evans before the conveyance from him to Evans and Huffman, then Huffman cannot maintain this action, unless on grounds hereafter to be stated, or unless facts are shown not suggested by the record before us: *Burgess* v. *Millican*, 50 Tex. 397.

The charge of the court was further calculated to mislead the jury, in that it made consent of Evans to the making of the deed to himself and Huffman essential to its validity or effect for the purpose of passing title.

If Evans did not know of or consent to the conveyance to himself and Huffman before the deed was made, but did subsequently have knowledge of it and of the transaction which brought it about, he would be bound by it as fully as would he by prior consent, if he recognized its validity and thus induced Huffman to rely upon title under it, while limitation would bar the claim due to the firm from Parman.

There was evidence tending to show that Evans knew of and recognized the validity of the deed to himself and Huffman.

If Evans knew of the facts stated by Huffman, and authorized the taking of the deed to himself and Huffman, then he cannot resist the right of Huffman to recover any interest in

the block which the facts may entitle him to, even though the notes of Parman were past due when that deed was made and Evans in possession of the land; but the interest of Huffman in the block, in the absence of some other controlling fact, ought to be measured by the proportion which his share of the purchase-money bears to the entire sum which was the consideration for the deed.

For the matters noticed, the judgment will be reversed and the cause remanded.

VENDOR AND VENDEE — RIGHT OF THE VENDOR TO RESCIND. — A vendee, refusing to go on with the contract after paying a part of the purchase-money, forfeits the amount already paid, and the vendor may consider the contract at an end, and sue in ejectment to recover the possession of the land: *Estes* v. *Browning*, 11 TEX. 237; 60 Am. Dec. 238, and note.

UNAUTHORIZED EXECUTION OF WRITTEN INSTRUMENTS, HOW RATIFIED: Note to *McDowell* v. *Simpson*, 27 Am. Dec. 343, 344.

TILLMAN *v.* HELLER.

[78 TEXAS, 597.]

FRAUDULENT CONVEYANCES — BONA FIDE PURCHASER FROM FRAUDULENT VENDEE. — A purchaser from an insolvent debtor who sells in fraud of his creditors must prove that, without notice of the fraud, he paid the purchase-money, or gave his negotiable note therefor; otherwise he acquires no title, and will not be protected.

FRAUDULENT CONVEYANCES — BONA FIDE PURCHASER — PART PAYMENT — BURDEN OF PROOF. — An innocent purchaser from an insolvent debtor selling in fraud of his creditors, who only pays part of the consideration in cash, and gives his note for the balance, will be protected only to the extent of the payment actually made, unless the note is negotiable; and the burden of proof is upon him to show its negotiability.

FRAUDULENT CONVEYANCES — INTENT — BONA FIDE PURCHASER — BURDEN OF PROOF, WHEN SHIFTS. — Under a statute making conveyances in fraud of creditors void as to them, and providing that "this article shall not affect the title of a purchaser for a valuable consideration, unless it appear that he had notice," the creditor, in order to defeat the conveyance, is bound, first, to show the fraudulent intent; the purchaser must then, in order to sustain his purchase, show that he has paid value; this being shown, the burden again shifts, and the creditor, in order to prevail, must show that at the time of the payment the purchaser had notice of the fraud.

ATTACHMENT. On October 10, 1887, E. M. Tillman caused an attachment to be levied on certain personal property as belonging to W. C. McDavid & Co. On October 11, 1887, A. W. Heller executed a claimant's bond, claiming the property as his own. Upon a trial of the issues, judgment was ren-

dered in favor of the claimant. The findings of the court were as follows: "1. That on the sixth day of October, 1887, defendant purchased the property levied on from Parker and McDavid, and at the time he did not know that they, or either of them, were selling for the purpose of hindering, delaying, or defrauding their creditors, if such was their purpose, neither were any facts known to him to lead him to suspect any such purpose; 2. He had no knowledge that either of the firm owed debts amounting to any sum that should have excited his inquiry into that matter; 3. Heller purchased in good faith for a valuable consideration, giving his notes in payment of the purchase-money, and paying four hundred dollars in cash on one of the notes on the same day; 4. There was nothing in the trade or manner of sale to excite Heller's suspicions that the firm were in debt, as the evidence shows they lived in the same small town, and no complaint had been heard as to the solvency of the firm; 5. The firm was insolvent at the time of the sale, also each member of the firm; 6. We believe the law to be that as Heller was a purchaser in good faith for a valuable consideration, and without any knowledge of the firm's indebtedness, it was not his business to see what disposition was made of his notes, or how the firm disposed of the money arising therefrom, and that under the facts he is entitled to judgment." Tillman appeals.

Poindexter and Padelford, for the appellant.

Smith and Davis, and W. H. Skelton, for the appellee.

GAINES, A. J. We are of the opinion that the motion for a rehearing in this case should be granted. We still concur in all the rulings of the former opinion, except as to the question whether or not the trial judge was correct in his conclusion that the appellee is to be deemed a *bona fide* purchaser for value. Under the facts of this case, the correctness of that conclusion depends upon the determination of two questions: 1. It being determined that the sale to appellee was fraudulent as to the creditors of the sellers, W. C. McDavid & Co., and that appellee had no notice of that intent, was it necessary that he should have paid or given his negotiable promissory notes for the consideration, in order to protect him against a recovery? 2. If that proposition be answered in the affirmative, upon whom did the burden rest to show whether or not the consideration was so paid or so promised?

The appellee testified that he gave two notes, each for $550,

and paid $400 before he had any notice of the sellers' intent to defraud their creditors. He did not testify whether the notes were negotiable or not. The rule we think universal that a grantee under a junior deed, in order to hold land as a *bona fide* purchaser for value, must show that the consideration has been actually paid, or that he has given a negotiable note therefor, which, in this court at least, is deemed equivalent to the same thing.

We have had some difficulty in determining whether or not a different rule should prevail as to one setting up the defense of an innocent purchaser as against a creditor seeking to set aside a fraudulent conveyance. But after a careful examination of the authorities, we have found none that recognize the distinction. On the contrary, there are quite a number of cases in which it has been pointedly held that in order for the purchaser to make the defense, it must appear that the consideration has actually passed: *Dougherty* v. *Cooper*, 77 Mo. 532; *Arnholt* v. *Hartwig*, 73 Mo. 485; *Dixon* v. *Hill*, 5 Mich. 404; *Bush* v. *Collins*, 35 Kan. 535. Such is the doctrine recognized by this court in *Belt* v. *Raguet*, 27 Tex. 471, and in *King* v. *Russell*, 40 Tex. 124, although neither called for a decision upon the point.

We therefore conclude that the appellee can only be protected to the extent of the money actually paid at the time he received notice of the fraudulent intent of his vendors in making the sale, unless the notes given by him were negotiable by the law merchant.

This brings us to the second question: Did appellee have the burden of showing that the notes were negotiable?

In *McAlpine* v. *Burnett*, 23 Tex. 649, it is held that the burden is upon the holder of a note claiming a vendor's lien against a purchaser from his vendee to show that the latter either had notice of the lien at the time of the purchase, or that he had not paid value. This is put upon the ground that he is seeking to enforce an equity against the legal title. But in the same case it is said that as to a party claiming to be an innocent purchaser upon the ground that he bought without notice of the prior conveyance, a different rule prevails, and the burden is upon him to show, not only that he had no notice, but that he has paid value. This is because he is seeking to set up an equity against the legal title. Neither of these rules enables us to decide the present question.

Article 2465 of the Revised Statutes declares, in effect, that

a conveyance intended to defraud creditors is void as to them, and in a distinct sentence adds the following provisions: "This article shall not affect the title of a purchaser for a valuable consideration, unless it appear that he had notice," etc.

The order of these several provisions seems to indicate how it was intended the burden of proof should shift during the progress of the trial: 1. The creditor, in order to defeat the conveyance, is bound to show the fraudulent intent; 2. When such intent is shown, the purchaser, in order to sustain the transaction, must show that he has paid value; 3. This being shown, the burden again shifts, and the creditor, in order to prevail in the action, must prove that at the time of the payment the purchaser had notice of the fraud. This seems to us the most reasonable and satisfactory rule. Another argument in its favor is, that the payment of the purchase-money is a fact peculiarly within the knowledge of the purchaser: 1 Starkie on Evidence, 421. This reason is especially applicable to the present case. The appellee testified in his own behalf that he gave two notes for the agreed price of the goods, but did not say whether they were negotiable or not. The appellant did not know the truth of the matter. Under such circumstances, it would be unreasonable to place the burden of proof upon the creditor, and compel him to go to his adversary for his evidence.

It is unnecessary to retain the case for further consideration. The judgment is therefore reversed, and the cause remanded.

FRAUDULENT CONVEYANCES — RIGHTS OF A PURCHASER FROM A FRAUDULENT GRANTOR. — To protect himself from attacks of creditors of his fraudulent grantor, a grantee must show that he parted with a valuable consideration in good faith: *Pochelu* v. *Catonnet*, 40 La. Ann. 327; *Nichols* v. *Bancroft*, 74 Mich. 191; *Black* v. *Vaughan*, 70 Tex. 47; *Paul* v. *Baugh*, 85 Va. 955; and showing good faith without proving a valuable consideration is insufficient: *Gove* v. *Campbell*, 62 N. H. 401; *Preston* v. *Cutter*, 64 N. H. 461; *Taylor* v. *Miles*, 19 Or. 551; *Brasher* v. *Jamison*, 75 Tex. 139; *Wagener* v. *Mars*, 27 S. C. 97. The burden is on the grantee to show good faith on his part, and that he paid a valuable consideration, where actual or constructive fraud is shown on the part af the grantee: *Thorington* v. *Montgomery*, 88 Ala. 548; *Kip* v. *Lamoreaux*, 81 Mich. 300; *Hodges* v. *Hickey*, 67 Miss. 715. A deed appearing on its face to have been voluntary may be shown by parol evidence to have been based upon a valuable consideration: *Jackson* v. *Lewis*, 29 S. C. 193; *Featherstone* v. *Dagnell*, 29 S. C. 45; compare *Van Raalte* v. *Harrington*, 101 Mo. 602; 20 Am. St. Rep. 626, and note 632, 633.

NELSON *v.* GALVESTON, HARRISBURG, AND SAN ANTONIO RAILWAY COMPANY.

[78 TEXAS, 621.]

POSTHUMOUS CHILD — RIGHT TO RECOVER FOR INJURY TO PARENT. — Under a statute giving a right of action for damages for injuries causing the death of a person, and providing that "the action shall be for the sole and exclusive benefit of the surviving children of the person whose death shall have been so caused," the word "children" includes a posthumous child, who is equally entitled to the benefit of such action with the other children.

POSTHUMOUS CHILD — RIGHT TO RECOVER FOR INJURY TO PARENT. — A posthumous child is entitled to recover damages for the death of his father, resulting from injuries inflicted by the negligence of a railroad company, under a statute giving to the "surviving children" of the deceased a right to maintain an action in such case.

POSTHUMOUS CHILD — RIGHT TO RECOVER FOR INJURY TO PARENT — STATUTE OF LIMITATIONS. — Where a posthumous child is entitled to recover damages for the death of his father, resulting from injuries inflicted by the negligence of a railroad company, the statute of limitations does not begin to run against him from the time when the cause of action accrued, merely because his mother was capable of commencing suit at that time.

POSTHUMOUS CHILD — RIGHT TO RECOVER FOR INJURY TO PARENT — JUDGMENT AS ESTOPPEL. — The right of a posthumous child to maintain suit to recover damages for the death of his father, resulting from injuries inflicted by the negligence of a railroad company, is not concluded by a judgment in a suit brought by his mother and another beneficiary against the company, in which the amount of compensation due such child is not included, nor his rights considered.

McLeary and King, and H. E. Barnard, for the appellant.

C. Upson, for the appellee.

HOBBY, J. The questions raised in this case are: 1. Whether a posthumous child is entitled to recover damages for the death of his father, resulting from injuries inflicted by the alleged negligence of the appellee company; 2. If the mother of such child be capable of suing for such damages when the cause of action accrues, does the statute of limitation run against the child? 3. Is said child concluded by a suit brought by its mother and another beneficiary against the company under our statute?

In the case of *Missouri Pac. R'y Co.* v. *Lehmberg*, 75 Tex. 61, it is stated, in the opinion by Associate Justice Henry, that "one of the children was born a month after the death" of his father, and a recovery was had by such child in that case; but the question before us was not discussed in the opinion, nor raised by the assignments.

The suit was brought by the mother of the appellant, Gustave Nelson, as his next friend, to recover damages for the death of his father, resulting from injuries negligently inflicted on his father by the appellee company.

The petition was filed on the eighteenth day of August, 1885. The averments in it necessary to a proper understanding of the questions involved show that the plaintiff's father, Gustave A. Nelson, was killed instantly in a collision occurring on defendant's road on the twenty-fifth day of April, 1882, which was caused by the alleged "gross carelessness and criminal and outrageous negligence of the defendant's officers," etc.; that the plaintiff was born on November 7, 1882, and is the legitimate son of said Gustave Nelson and Margaret Nelson, his next friend, now a *feme sole*. The deceased left no surviving father or mother, but only his widow, the said Margaret Nelson, and a daughter, Kate Barbara Nelson, and plaintiff, at the time of said collision "unborn and in his mother's womb."

It is further alleged that said Margaret and said Kate Barbara "compromised and settled their claims against said company arising out of the death of said Gustave Nelson, but that none has been made of plaintiff's claim, and he is entitled to compensation," etc. Actual damages are laid at twenty-five thousand dollars, and exemplary damages at ten thousand dollars.

Exceptions to the petition were filed by the company on September 8, 1885, on the ground that it showed that plaintiff's cause of action accrued more than one year before its filing, and that if any cause of action ever existed it appeared to have been fully paid and discharged. These exceptions were overruled by the court on September 19, 1885.

On September 24, 1888, an amended answer was filed by the company, containing a general denial, and specially alleging that for the injuries from which it is alleged Gustave Nelson died, a judgment was recovered against the company on June 14, 1882, in the sum of $5,088, in a suit brought by plaintiff's mother in the district court of Bexar County, for the benefit of the children of Gustave Nelson and herself; that this amount was paid to the parties entitled thereto, and that it discharged all claims against defendant.

The answer also averred that at the time of the death of said Gustave Nelson, the plaintiff was an unknown quantity, unborn, had not then and does not now have any right of

action against the company by reason of said death. The statute of limitation of one year is pleaded by the company.

In bar of plaintiff's right to recover, it is also pleaded that "from the date of plaintiff's birth, November 7, 1882, until the institution of this suit, on August 18, 1885. his mother, natural guardian and next friend, was able and had the right to sue for his benefit, if he had any right; that she failed to bring suit within one year after plaintiff's birth, and that he is therefore barred."

On September 25, 1888, the plaintiff excepted specially to the last plea of the company alleging that plaintiff was unborn at the time of his father's death and had no right of action; and excepting also to the plea of limitation set up by the company.

These exceptions to the answer were by the court overruled on September 27, 1888, and it was further ordered that the previous ruling of the court overruling defendant's exceptions to the petition be revoked and set aside, and that the general and special exceptions filed by the company on September 8, 1885, to the petition be sustained.

Plaintiff declining to amend, the cause was dismissed. The judgment of the lower court is before us on appeal by the plaintiff, the appellant here.

We cannot determine whether this suit was dismissed because it was believed that no right of action accrued to plaintiff under our statute for the recovery of damages for the death of his father from the causes alleged, by reason of the fact that he was born after the death of his father, or because the plaintiff was thought to be concluded by a suit previously brought by his mother for herself and another child, upon the theory that only one suit was maintainable, or because he was barred by reason of the fact that his mother was capable of suing for him at the time of his father's death, and this suit was not brought within one year thereafter. Whether one or more of the foregoing reasons influenced the judgment of the court below we are not apprised. Therefore, as we consider the two last-mentioned questions settled in this state adversely to the decision below, we will consider the ground first mentioned as principally affording the basis of the judgment of the lower court.

It is, in effect, claimed by the appellee that at the time of the death of the plaintiff's father, on the 25th of April, 1882, the plaintiff was not in being, was unborn and unknown, and an

unheard of quantity, having no legal existence, and no right of action for the injuries complained of. This is unquestionably true, unless it is given by a fair and reasonable construction of the statute.

The right of action in a case of this character is wholly statutory. It did not exist at common law, as it died with the person. Such seems to have been the law until the passage, in 1846, of Lord Campbell's Act by the British Parliament. This act authorized a recovery for injuries resulting in death by the personal representative of the deceased. It is said to be substantially in force in nearly all of the states: *Louisville etc. R. R. Co.* v. *Sanders*, 86 Ky. 259. In our state this right of action is wisely recognized by the organic law, supplemented by guarded legislative provisions enacted for the purpose of securing to the beneficiaries just compensation in a case meriting it, and protecting the defendant from excessive recoveries.

After giving the right to sue for actual damages on account of injuries causing the death of a person, our statute (Rev. Stats., art. 2903) provides: "The action shall be for the sole and exclusive benefit of the surviving children of the person whose death shall have been so caused," etc.

The question, then, is, whether the term "children," as used in the statute, includes a posthumous child of "the person whose death shall have been so caused," etc. Was it the intention of the legislature that such child should, equally with other children of the deceased, be entitled to the benefit of this article? and if so, is that made manifest by the language used?

Whether and to what extent a posthumous child can take and hold property by inheritance and purchase, and what are his rights, generally, under carefully framed statutes and wills, is a question which has been illuminated by the learning of many of the sages of the English law.

Perhaps no case, when it was decided, in 1798, involved more important rights than that of *Thellusson* v. *Woodford*, 2 Ves. Jr. 319. Counsel and judges of high authority engaged in its discussion and decision. Replying to the contention that an unborn child was a nonentity, and in that case the limitation was therefore void, Mr. Justice Buller said: "Let us see what this nonentity can do. He may be vouched in a recovery, though it is for the purpose of making him answer

over in value; he may be an executor; he may take under the statute of distributions; he may have an injunction, a guardian."

Lord Hardwicke, discussing the same question, held that a child in the mother's womb is a person in *rerum natura*, and that by the rules of the civil and common laws "she [the child] was, to all intents and purposes, a child as if born in her father's lifetime."

Speaking of the civil law, which limits the operation of this rule to cases where it is for the benefit of the child to be considered as born, he says it is to be considered as living, for all purposes.

Many old English cases are cited in the case referred to, deciding that such a child was held to be living at the death of the testator, and that an unborn child was entitled, under the "description of children born, as being within the reason and motive of a gift."

In *Doe* v. *Clark* it was held "that wherever such consideration would be for his benefit, a child *in venter sa mere* shall be considered as absolutely born." *Goodtitle* v. *Wood*, 7 Term Rep., is to the effect that there is no difference between a child actually born and a child *in venter sa mere*. Again, in *Lancashire* v. *Lancashire*, it is said: "No argument founded on law and natural justice is in favor of the child born during the father's life that does not equally extend to a posthumous child." The law must make the same presumption in the favor of one that it does in favor of the other.

This case concludes with the declaration of the principle that "a posthumous child must be considered in the same situation and entitled to the same benefits as one born during the life of its father." Such is the doctrine of cases decided in 1798, almost a century since, establishing the rights of such children to that character of property — real estate — which has been generally regarded as the most attractive and valuable over which the dominion of man has been asserted, and the ownership of which then carried with it privileges and rights frequently coveted more than the property itself.

If, then, the construction of wills, devises, and statutes was such as operated to enable a posthumous child to inherit and hold property of the character described, and considered him in all respects as entitled to the rights of a child born before the death of the father, can there be any reasonable doubt that the proper construction of our statute giving the right of ac-

tion to the "surviving children" of the person whose death was caused, etc., includes the plaintiff in this case as one of such children?

Had the expression "surviving children" been used in a will in the same connection as in the statute, and had it been for the benefit of the posthumous child to take under the authorities cited, it would be held to apply to him. Had the children born before the father's death been provided for by will, and it was silent as to the posthumous child, nevertheless he would not be excluded under the will because not named. The principle underlying this is, that it would not be presumed that the testator intended to exclude such a child from the benefits of the will merely because he had not expressly mentioned him as such, and had expressly referred to the children born prior to his death. There can be no stronger reason for presuming that the legislature intended to exclude a posthumous child from the benefit of article 2903 than there would be for supposing a testator, by the use of similar language, intended to exclude him.

We conclude, therefore, that it was manifestly the purpose of the legislature to give the right of action, in a case like the present, to all of the surviving children of the deceased. We think, also, that the plaintiff in this case, although unborn at the time of his father's death, was in being, and one of his surviving children.

The remaining questions affecting the plaintiff's right to sue, and which are raised on this appeal, require, we think, but a brief consideration.

It is claimed by appellee that there is but one cause of action, which accrues at the time of the death of the party injured; that the action shall be for the sole benefit of the surviving wife and children in being, and there can be but one recovery; and that if, at the time of the accrual of the cause of action, there is any person entitled to sue, laboring under no disability, and the action is not brought within one year after its accrual, there can be no recovery.

In support of this doctrine, we are cited to the case of the *Louisville etc. R. R. Co.* v. *Sanders*, 86 Ky. 258. Although the opinion emanates from a court of recognized ability and high authority, the principles there announced are certainly not in accord with those well established in our state. The Kentucky statute, in a case like the one under consideration, provides that "the widow, heir, or other personal representa-

tive of the deceased shall have the right to sue and recover punitive damages for the loss," etc. It requires, as does our general law of limitation, that the suit shall be brought within one year next after the cause of action shall accrue. There is also a provision in the statutes of that state giving infants, etc., the same length of time after the removal of their disability to bring suit. These statutes were cited in the case mentioned, and it was held that, "as the statute giving the right of action was punitive, there could be but one recovery. And as there is but one cause of action, and the right to sue upon it is given to either of three persons, and there is one *in esse* who can sue, and fails to do so within one year from the accrual of the cause of action, all are barred, although the others may be under the disability of minority."

In the case cited, the doctrine that the infant was barred by the statute of limitation of one year seems to be predicated upon the rule that there can be but one recovery. As this rule does not obtain in our state, the doctrine of the case cited does not apply.

It is true, as claimed by the appellee, that the statute only contemplated that one suit should be brought; but this means one suit brought by all the beneficiaries, or one to which they are made parties: *Galveston etc. R'y Co.* v. *Kutac*, 72 Tex. 647. The purpose of that statute in this respect is to prevent the defendant (the company) from being subjected to a double payment to any one beneficiary.

If the mother and one child sue and recover only the compensation awarded them by a verdict, and, as in this case, another child sues, it cannot be precluded on the ground that one action has been brought by all the beneficiaries, or that one beneficiary has brought the action for all, because no such action has been brought. If it had, it would be the one suit contemplated by the statute. The amount to which all the beneficiaries would be entitled, if at all, would be included in that suit, and another could not be properly brought and a second judgment, in whole or in part, recovered against the same defendant. But if the amount of compensation of any one of the beneficiaries had not been included in such suit, and he is entitled to it, upon no principle of reason should he be concluded by a judgment in which his rights were not considered.

If the defendant is liable to three beneficiaries under the statute, the aggregate compensation to which they are justly

entitled should be no greater, whether it be recovered in three suits brought by each of them, or one suit brought by all.

It is unnecessary to consider the questions presented by the fourth, fifth, and tenth assignments of error, as it is not probable that they will be raised upon another trial of this cause.

Because the court erred in overruling plaintiff's special exceptions filed on September 25, 1888, to the defendant's answer filed on the 24th of September, 1884, and because of the error in sustaining the defendant's general and special exceptions filed September 8, 1885, to plaintiff's original petition, and in dismissing plaintiff's suit, we think the judgment should be reversed and the cause remanded.

PARENT AND CHILD. — As to when a child *in ventre sa mere* will be regarded as *in esse*, see *Harper* v. *Archer*, 4 Smedes & M. 99; 43 Am. Dec. 472, and particularly note 474, 475.

EDDY *v.* HARRIS.

[78 TEXAS, 661.]

CARRIER OF PASSENGERS — LIABILITY ON CONTRACT OF AGENT. — Where the agent of the receiver of a railroad sells a ticket to an applicant, which is good only on a special excursion train in charge of a third person, whose name is attached to the ticket purchased, but of whose contract with the carrier the purchaser is ignorant, a binding contract for transportation according to the terms of the ticket exists between the carrier and such purchaser.

CARRIER OF PASSENGERS — DAMAGES FOR BREACH OF CONTRACT OF CARRIAGE. — Where the failure of the carrier to transport a passenger according to the terms of the contract, as shown by the ticket purchased, only results in the loss of one day's time, the passenger can only recover for such loss of time, together with the amount paid for the ticket, and interest thereon.

Peteet and Crosby, for the appellant.

B. W. Foster and H. E. Henderson, for the appellee.

STAYTON, C. J. Appellants, as receivers, made a contract with one Sparks, whereby the latter was to have the use of cars on road controlled by appellants, for the purpose of transporting excursionists on June 19, 1889, from Sulphur Springs and Greenville to Dallas and return.

For the cars, Sparks agreed to pay $395, of which $100 was paid in advance, and the balance was to be paid before the cars should leave the two places named.

The time for leaving the several points, both in going and returning, was fixed by the contract with Sparks, but of that contract, or that Sparks had control of the excursion train, appellee, on the morning of the 19th of June, was ignorant, but she did know that an excursion train was to run on that day from the places named to Dallas and return.

The sum to be paid for train between Sulphur Springs and Greenville and return, and between the latter place and Dallas and return, seems to have been fixed, and the sum paid by Sparks in advance, with such sum as was received on sale of tickets by the agent of receivers at Sulphur Springs, exceeded the sum to be paid for train between that place and Greenville.

Sparks had tickets printed, which were as follows: —

"Round trip. June 19, 1889. Good only on special train to-day on M., K., & T. R. R. Sulphur Springs to Dallas and return. J. SPARKS, Manager."

These tickets were placed by Sparks in the hands of the receivers' ticket agent for sale, and on the morning of June 19, 1889, appellee, desiring to go to and return from Dallas on the excursion train, which she understood would go on that day, applied to that agent, who was selling tickets at the office and usual place for selling tickets, for a ticket from Sulphur Springs to Greenville, probably thinking, as there was a change in the gauge at Greenville, that she would have to buy tickets at each place.

The agent informed her that he could not sell her a ticket for the excursion train then standing at the depot to Greenville, but that he could sell her a ticket to Dallas and return; whereupon she paid to him $2.40 and received a ticket in the form above set out, she being ignorant that Sparks had any connection with or control of the train. The sum paid was the excursion rate from Sulphur Springs to Dallas and return.

After purchasing the ticket, appellee entered a car and the train proceeded to Greenville, there being many other persons on board situated as was appellee. When the train reached Greenville, Sparks having failed to pay the sum he had agreed to pay before the train should leave that place, the officers of the road refused to send the excursion train through; but on payment of $1.55 appellee was carried to Dallas and returned to Sulphur Springs, which she reached on the same train and at the same time she would have reached that place had the

excursion train gone from Greenville to Dallas as at first contemplated in the agreement between Sparks and appellants. There was, however, some delay at Greenville, and the train on which appellee went to Dallas did not reach that place by about three hours as early as it would had the excursion train gone through as contemplated by the agreement with Sparks.

It further appears that the train on which appellee returned from Dallas left that place about 5 o'clock, P. M., on June 19th, when it was not contemplated that the train which Sparks had contracted for would leave Dallas before midnight.

The purpose of those going on the excursion was to attend the anniversary of emancipation, and appellee, on account of the delay at Greenville, may not have witnessed the ceremonies attending the celebration, and further, did not arrive in time to partake of a free dinner which she might have received had she arrived at the time the excursion train would had it gone through as contemplated in the agreement with Sparks.

Judgment on this state of facts was rendered in favor of appellee for fifty dollars.

It is urged that the court below erred in holding that under the facts the receivers were bound, under the act of their agent, to transport appellee to Dallas and return for the sum paid to that agent.

We are of opinion that there was no error in this respect, and that when appellee paid to the agent of the receivers, at their office, where he in the usual place and course of business sold tickets, the sum which he demanded for transportation to and from Dallas, that a contract binding on appellants was made, and that for their violation of it, appellee has cause of action.

Appellee was ignorant of the agreement between appellants and Sparks, and the fact that the ticket given to her was signed "J. Sparks, Manager," was not sufficient to charge her with notice of it.

When the agent of a railway company, or of receivers in charge of a railway, receives the money of one desiring to become a passenger from one point to another, then a contract binding on the company or receiver exists; and it may well be doubted if knowledge of appellee that Sparks had contracted for the train on that day would affect the question, for if his right to the train was not fixed, such an agent ought not, in the usual course of business, to receive the money of one desiring to become a passenger.

If Sparks had complied with his contract, its breach by appellants would have given to one who had purchased tickets for that day a cause of action; and if appellee had known of Sparks's contract, the act of appellant's agent would be equivalent to a declaration that he had complied with it.

It is urged that the judgment is excessive, and we are of opinion that there are no facts stated in the court's conclusions of fact sufficient to sustain the judgment.

Appellee is entitled to recover the sum paid by her at Greenville, with interest thereon, as damages, and, as the purpose of her visit to Dallas was practically defeated by the delay at Greenville, to compensation for loss of time, which may embrace the entire period from time of her leaving Sulphur Springs till her return; but this is the extent of her rights, under the facts shown.

Because the judgment is excessive it will be reversed; and as there is no finding of fact on which judgment can be here rendered, the case will be remanded.

CARRIERS OF PASSENGERS — DAMAGES FOR DELAY IN CARRIAGE. — For the measure of damages recoverable against a carrier for a delay in transporting a passenger to his point of destination, see *Williams* v. *Vanderbilt*, 28 N. Y. 217; 84 Am. Dec. 333, and note.

CASES

IN THE

SUPREME COURT

OF

VERMONT.

CUSHMAN *v.* SOMERS.

[62 VERMONT, 122.]

PRACTICE. — WHERE CHARGE AS A WHOLE IS CORRECT the judgment will not be reversed, although an extract from the charge, taken by itself, is erroneous.

PRINCIPAL AND AGENT — APPARENT AUTHORITY OF AGENT. — Where an agent, with express authority to collect, and apparent authority to manage the manner of collection, receives money in payment in lieu of a royalty payable in pulp, his principal is bound by the payment.

EVIDENCE — DECLARATIONS OF AGENT. — A witness who has testified to certain declarations made by an agent during the term of his agency cannot be permitted, on cross-examination, to testify to contrary declarations made by such agent after the expiration of his agency.

COVENANT. Judgment for defendant, and plaintiff appealed.

Ide and Stafford, for the appellant.

Bates and May, for the respondent.

TAFT, J. The defendant was under contract to pay the plaintiff, as royaly for a wood-pulp grinder, two tons of dry pulp monthly. He claimed that George Cushman, the plaintiff's brother, acting for the plaintiff, had agreed to take money in lieu of pulp. Whether such an agreement had been made, and if so, whether George had authority to make it, were the important questions raised upon the trial.

1. The only exception to the charge insisted upon in argument is the one taken to the statement in it, "that if George had authority to collect the royalty, and so acted in the collection of it as to lead the defendant to understand that he need not pay in pulp, then the plaintiff cannot recover." This

statement of the law, taken by itself, naked and alone, may be erroneous, for it may well be claimed that mere authority to collect gives no power to vary, in any way, the terms of payment; so that if the extract above quoted was all there was of the charge, and there were no facts in the case except such as required that charge, and that alone, there would undoubtedly be solid ground for the plaintiff's claim that it was error. But we are not called upon to say that it was error, for the whole charge is before us, and it must be construed as a whole: *Fassett* v. *Roxbury*, 55 Vt. 552; *Stevens* v. *Dudley*, 56 Vt. 169. And it must be construed in connection with the testimony in the case, and as applicable to it; and if the charge as a whole was correct, the judgment should not be reversed, although the extract, taken by itself, was erroneous. There was evidence in the case tending to show that the plaintiff held out George Cushman as having authority to collect the royalty in the manner that the defendant claimed that he agreed to do it. The evidence tended to show that he sanctioned a settlement made by George with the defendant, under the change in the mode of payment as claimed by the defendant; and if he had no authority in fact to collect it in any way save in pulp, if the plaintiff had invested him with apparent authority to collect it in some other way, and he led the defendant to believe that he might pay in a different way, and agreed that he might, the plaintiff would be bound by it. The apparent authority with which the plaintiff had invested George, or rather the rule that governed George's acts done under such authority, was as applicable to the acts of George done in connection with the collection of the royalty as it was to his acts in regard to a substitution of one mode of payment for the other; it was in reality the same rule. There was nothing for George to do except to collect the royalty, and the question in dispute was, whether he had agreed to collect it in any other way than as originally provided; and the court told the jury if he had no direct authority from his brother to change the mode of payment, yet if he had "apparent authority" to do it, if he was "held out to the world" by his brother as having it, if he "was held out in such a way to Somers that Somers had reasonable cause to believe he was the agent of his brother, then he (the defendant) would be justified in treating with him and acting upon his propositions, even though he was not in fact the agent of his brother," and "that a man might not be an agent in fact, still the per-

son whom he professed to represent might so hold him out to the world that he would be bound by his acts, although he was not his agent." We think the extract from the charge, "that if George had authority to collect the royalty, and so acted in the collection of it as to lead the defendant to understand that he need not pay in pulp, then the plaintiff cannot recover," must be taken in connection with what goes both before and after the sentence quoted from the charge. The only matter in controversy was the collection of the royalty, and the court says, in the first part of the charge: "And the court instructs you in this matter of agency, ... that if the plaintiff gave George apparent authority to manage the matter of the royalty, and George agreed that the defendant might pay in money one half the amount paid by the plaintiff to settle with Russell, and the defendant agreed to pay in money in that way, then the plaintiff cannot maintain an action of covenant." To "manage the matter of the royalty" relates as much to the collection of it as to any other question connected with it and the letter as well as the whole spirit of the charge is, that if the plaintiff gave George apparent authority to manage it, in its collection, he would be bound by his acts, even if he had given him no real authority. The charge as given was correct upon the facts in the case, and this is the only question in respect of the charge before us.

2. One Bancroft, a witness called by the defendant, testified that on or before the 23d of July, 1881, George Cushman told him that the royalty was to be paid in money. On cross-examination, the plaintiff offered to show that George, several years afterwards, and after the lease had expired, claimed otherwise. This offered testimony was excluded. It does not appear upon what ground. It was the declaration of an agent after the expiration of the business in question, in favor of his principal, and if admissible, if offered by the plaintiff when putting in his side of the case, it certainly was no part of the cross-examination, and inadmissible for that reason. It does not appear that there was error in its exclusion, and we cannot presume it.

Judgment affirmed.

AGENCY — LIABILITY OF PRINCIPAL FOR ACTS OF AGENT — APPARENT AUTHORITY. — As to third persons, the principal is bound by the acts of his agent done within the apparent scope of his authority; and his actual instructions do not govern, unless the person dealing with him had notice of his real authority: *Wachter* v. *Phœnix Assur. Co.*, 132 Pa. St. 423; 19 Am.

St. Rep. 600, and note. The rule that a principal is bound by the acts of his agent within the apparent scope of his authority is applicable only when there have been previous transactions of a similar character, in which the agent exceeded his powers, and which were ratified by the principal, and without knowledge on the part of the third party of a limitation of the agent's authority, and an excess in the particular case, whereby such party was led to believe that the agent had all the powers assumed by him: *Kane* v. *Barstow*, 42 Kan. 465; 16 Am. St. Rep. 490, and note 493, 494, upon the question of the agent's power to bind his principal by acts not authorized, but done in the apparent scope of his authority. One clothing an agent with apparent authority is estopped to deny such authority with respect to persons dealing with the agent on the faith thereof: *Hubbard* v. *Tenbrook*, 124 Pa. St. 291; 10 Am. St. Rep. 585, and note; *Barry* v. *Boston etc. Ins. Co.*, 62 Mich. 424; *Howell* v. *Graff*, 25 Neb. 130; *Milne* v. *Kleb*, 44 N. J. Eq. 378; *Stovall* v. *Commonwealth*, 84 Va. 246. But outside his apparent authority, the agent cannot bind his principal: *Fore* v. *Campbell*, 82 Va. 808; *Covington* v. *Newberyer*, 99 N. C. 523; *Beebe* v. *Equitable etc. Ass'n*, 76 Iowa, 129.

BATES *v.* RUTLAND.

[62 VERMONT, 178.]

MUNICIPAL CORPORATIONS — LIABILITY FOR DEFECTS IN STREETS. — Where the charter imposes no liability on a municipal corporation for damages sustained by individuals upon its streets and highways in consequence of defects therein, such defects are not actionable.

MUNICIPAL CORPORATIONS — LIABILITY FOR NEGLIGENCE OF OFFICERS. — The trustees and street commissioner of a municipal corporation, which is bound by law to maintain the streets and highways within its limits, are public officers, and act as such in locating and using a stone-crusher in the highway outside the city limits for the purpose of crushing stone for the construction and repair of its streets. In such case, the corporation is not liable for the negligence of such officers.

MUNICIPAL CORPORATIONS — LIABILITY FOR NEGLIGENCE OF OFFICERS. — The officers of a municipal corporation engaged in the public work of repairing its streets are public officers, and an action will not lie against the city for their negligent acts in performing such work.

CASE for negligence against the village of Rutland. A stone-crusher was located outside the village limits in the highway, with the consent of a majority of the selectmen of the village, by the trustees thereof, and was used by their direction in crushing stone for the construction and repair of the village streets. Plaintiff's horse became frightened at the crusher, whereby plaintiff's wife was thrown from her carriage, and injured. Judgment for plaintiff, and defendant appealed.

Butler and Moloney, for the appellant.

Lawrence and Meldon, and J. C. Baker, for the respondent.

TYLER, J. The defendant is a municipal corporation organized under a charter granted by the legislature in November, 1882. Section 1 of its charter defines its boundaries. Its corporate relation to and control of the streets and highways within its limits are set forth in section 46, which is as follows: "All the territory embraced within the limits of said village is hereby constituted a highway district of the town of Rutland, and all the highway taxes assessed upon the polls and ratable estate thereof shall be paid in money, and the selectmen of the town of Rutland shall make out a tax-bill thereof, and deliver the same seasonably, as required by law, with a warrant for its collection, to the collector of said village, who shall collect the same as other taxes of said village are collected, and pay the same over to the treasurer of the village, which money shall be drawn from said treasury by said trustees, and shall be expended by them in building, constructing, maintaining, and repairing the streets, highways, walks, alleys, sewers, and lanes of said village, and no surveyors of the said highway district shall be required or chosen by said town."

It is provided that its trustees may appoint and remove at pleasure, among other officers, a street commissioner, who shall superintend the construction and repair of streets, walks, culverts, sewers, and drains, subject to the authority and discretion of the trustees.

It will be observed that the charter imposes no liability on the village corporation for damages sustained by individuals upon its streets and highways in consequence of defects therein, and it has long been settled law that, in the absence of express statutes declaring liability, such defects are not actionable. In *Hill* v. *Boston*, 122 Mass. 344, 23 Am. Rep. 332, Mr. Justice Gray makes a very thorough examination of the authorities on the subject, and says: "The result of this review of the American cases may be summed up as follows: There is no case in which the neglect of a duty imposed by general law on all cities and towns alike has been held to sustain an action by a person injured thereby against a city when it would not against a town. In the absence of such binding decisions, we find it difficult to reconcile the view that the mere acceptance of a municipal charter is to be considered as conferring such a benefit upon the corporation as will render it liable to private action for neglect of the duties thereby imposed upon it, with the doctrine that the purpose of the crea-

tion of municipal corporations by the state is to exercise a part of its powers of government." See also *Parker* v. *Village of Rutland*, 56 Vt. 224; *Weller* v. *City of Burlington*, 60 Vt. 28.

The town of Rutland was bound by law to maintain all the streets and highways within its boundaries. It maintained those within the village of Rutland, through the instrumentality of the village corporation, which was a mere highway district of the town.

It is needless to decide or discuss the question whether the defendant had a legal right to purchase a stone-crusher. Pursuant to the provisions of the charter, all the highway taxes assessed upon the polls and ratable estate of the village were collected and paid into the village treasury, and were drawn out by the trustees and expended by them in maintaining walks, streets, etc. The question is, whether the trustees and street commissioner, while engaged in work upon the streets, were public officers, or servants and agents of the village. If the former, the defendant is not liable; if the latter, it is liable for their acts of negligence.

It must be conceded that the defendant corporation is a political subdivision of the state, chartered and organized mainly for governmental purposes. Then, were the trustees and street commissioner, at the time of the accident, engaged in a public service, or in a work that was for the peculiar benefit of the defendant in its local or special interests? The character of the employment is determinative of the defendant's liability for the acts of these officers. This subject is elaborately discussed in *Bailey* v. *Mayor etc. of New York*, 3 Hill, 531; 38 Am. Dec. 669; and in *Scott* v. *Mayor etc. of Manchester*, 2 Hurl. & N. 204; *Hill* v. *Boston*, 122 Mass. 344; 23 Am. Rep. 332. In the case last cited, Justice Gray says: "The result of the English authorities is, that when a duty is imposed upon a municipal corporation for the benefit of the public, without any consideration or emolument received by the corporation, it is only where the duty is a new one, and is such as is ordinarily performed by trading corporations, that an intention to give a private action for a neglect in its performance is to be presumed": 2 Dillon on Municipal Corporations, secs. 974 et seq.; *Weller* v. *City of Burlington*, 60 Vt. 28.

By an act of the legislature of Massachusetts, the selectmen of towns were authorized to establish and maintain such drinking-troughs within public highways as in their judgment public necessity and convenience required, and towns

were authorized to raise and appropriate money to pay the expense of the same. In a case where troughs, painted in such a manner as to frighten horses, were put up by selectmen, it was held that the selectmen were public officers; that the town was not liable; that it had no corporate interest in the work.

The line of distinction between corporate duties that are governmental and performed in behalf of the public, and those that inure to the special advantage of municipalities, is defined in *Welsh* v. *Village of Rutland*, 56 Vt. 228, and *Weller* v. *City of Burlington*, 60 Vt. 28. The reasoning of the chief justice in the former case is applicable to the facts in the one at bar. The defendant was engaged in the public work of repairing its streets. The officers by whom the work was being performed were, for this purpose, public officers, and for their negligent acts an action does not lie against the defendant. This view is in accordance with the decision in *Wilkins* v. *Village of Rutland*, 61 Vt. 336.

We think the court should have directed a verdict for the defendant as requested; therefore the judgment is reversed, and judgment for the defendant.

MUNICIPAL CORPORATIONS ARE NOT LIABLE FOR DAMAGES SUSTAINED BY PERSONS upon their streets occasioned by defects therein, when their charters do not impose such liability: *Arkadelphia* v. *Windham*, 49 Ark. 139; 4 Am. St. Rep. 32, and note. But when charged with the duty of keeping their streets in repair by their charters, they are liable for neglect to perform such duty: *Maus* v. *Springfield*, 101 Mo. 613; 20 Am. St. Rep. 634, and note.

MUNICIPAL CORPORATIONS — LIABILITY FOR NEGLIGENCE OF OFFICERS. — Municipal officers in the performance of their duties are public agents, and do not ordinarily render the municipality responsible for their negligence: *Caspary* v. *City of Portland*, 19 Or. 496; 20 Am. St. Rep. 842, and note; *Kies* v. *Erie*, 135 Pa. St. 144; 20 Am. St. Rep. 867, and note; unless such liability is fixed by statute: *O'Leary* v. *Board of Commissioners*, 79 Mich. 281; 19 Am. St. Rep. 169, and note; *Weller* v. *St. Paul*, 40 Minn. 460; 12 Am. St. Rep. 752, and note.

PARKER *v.* CHASE.

[62 VERMONT, 206.]

CHATTEL MORTGAGE — SUFFICIENCY OF DESCRIPTION. — A chattel mortgage of "three cows" or of "five cows," the mortgagor having at least six cows at the time that the mortgage was given, or of "two cows delivered to me by" a certain person, the mortgagor having at that time five cows delivered to him by the same person, is void for indefiniteness of description.

CHATTEL MORTGAGE — SUFFICIENCY OF DESCRIPTION. — While the description of property enumerated in a chattel mortgage need not be sufficiently definite to enable one to find the property without inquiry, in order to make the mortgage valid it must be such as to indicate the line of inquiry and furnish the basis of identification. The instrument must contain some designation which, when aided by further information, will determine what property is mortgaged. The number of articles may be sufficient if the mortgagor owns no more than the number given; but the mere statement of a number, when the mortgagor owns a larger number, in no way designates the property, and renders the mortgage void for indefiniteness.

CHATTEL MORTGAGE — SUFFICIENCY OF DESCRIPTION. — A chattel mortgage which leaves the designation of the specific property mentioned therein resting exclusively in the minds of the parties fails to meet the purposes and requirements of the law, and is void for indefiniteness.

TROVER. Judgment for the plaintiff, and the defendants appealed.

I. N. Chase and Willard Farrington, for the appellants.

Cross and Start, for the respondent.

MUNSON, J. This suit is to recover damages for the taking of six cows. The plaintiff claims title as purchaser at an execution sale. The defendants justify the taking under three chattel mortgages, given by the execution debtor before the attachment. The plaintiff contests the validity of the mortgages as regards the property in dispute. The question is as to the sufficiency of the description.

One mortgage is of "three cows," and another of "five cows," neither containing any further designation. When these mortgages were given, the mortgagor had at least six cows. The remaining mortgage covers "two cows, being the same cows delivered to me by Edwin Strait." At the time this was given, the mortgagor had five cows received from Strait. All the mortgages were duly recorded.

On the hearing before the referee, an attempt was made to apply these mortgages to the cows in question. Evidence was taken, under objection, to ascertain upon which of the

mortgagor's cows the mortgages were placed. With this evidence before him, the referee is unable to connect four of the cows in suit with the mortgages. The remaining two cows are found, upon the testimony of parties to the mortgages, to have been encumbered. But the referee finds no connecting link between the two cows and the mortgages except the assertions of the witnesses.

These mortgages cannot be made effective against the plaintiff. The descriptions are not sufficient to give notice of an encumbrance. While a description need not be enough to enable one to find the property without inquiry, it must be such as to indicate the line of inquiry and furnish the basis of identification. The instrument must contain some designation which, when aided by further information, will determine what property is mortgaged. The number of the articles may be sufficient if the mortgagor owns no more than the number given. But the mere statement of a number, when the mortgagor owns a larger number, in no way designates the property.

It is suggested that such a mortgage is notice that a given number are encumbered, and that the parties may be called upon to complete the designation. A mortgage which leaves the designation of the specific property resting exclusively in the minds of the parties fails to meet the fundamental purposes and requirements of the law. The designation made here by the referee has no foundation except the assertions of the parties. The result is not arrived at by applying their testimony to any descriptive matter in the deeds. The evidence is introduced, not in aid of something which requires explanation, but to supply something which is entirely wanting. It cannot be made use of for that purpose. The mortgages are not sufficiently specific in description to be sustained: Jones on Chattel Mortgages, sec. 56; *Croswell* v. *Allis*, 25 Conn. 301; *Newell* v. *Warner*, 44 Barb. 258; *Sowders* v. *Voorhees*, 36 Kan. 188.

Judgment affirmed.

CHATTEL MORTGAGES, SUFFICIENCY OF DESCRIPTIONS IN. — As to the sufficiency of the description of the property covered by a chattel mortgage, see extended note to *Barrett* v. *Fiock*, 14 Am. St. Rep. 239–247.

SOWLES *v.* HALL.

[62 VERMONT, 247.]

MORTGAGE — FORECLOSURE. — A third mortgagee, who is made a defendant in suits to foreclose the prior mortgages, and who, after foreclosure and the expiration of the equity of redemption, acquires an equitable interest in the property by agreement with the owner of the title, does not thereby reinstate his mortgage as a lien upon the property for the benefit of a holder of the notes secured thereby, which he has transferred.

CONTRACTS TO CONVEY, TIME AS ESSENCE OF — SPECIFIC PERFORMANCE. — Where one holding the equity of redemption to certain land procures another to furnish money to redeem, and deeds the premises to him, obtaining from him in return an agreement to sell and convey the land to a third party upon the tender by the latter of a certain sum at any time prior to a certain date, and unless such tender is made on or before such date the agreement is to become absolutely null and void, time is of the essence of the agreement, and unless the tender is made according to its terms, and before the date mentioned therein, such third party acquires no equitable title in the land.

BILL to compel specific performance of a written contract for the sale of certain land, or to foreclose defendant's equity of redemption therein, as might be equitable. The plaintiff was the daughter of E. A. Sowles, who acted as her agent in all the transactions hereinafter referred to. The defendant Ida A. Hall was the wife of defendant B. C. Hall, who acted as her agent in all such transactions. At such times both Sowles and Hall occupied the same office, Hall acting as attorney and agent for Sowles in many matters. In 1876 Catherine Mann owned certain land in St. Albans, under mortgage to the Ottauquechee Savings Bank. On November 15, 1876, she and her husband executed a second mortgage of said land to J. C. Babbett, and on December 11, 1876, E. A. Sowles took a third mortgage on the same land. Mrs. Mann had built three houses on the land, and on December 26, 1876, she conveyed one of these, together with the lot on which it stood, to M. McGiff by warranty deed. The mortgage held by Babbett was subsequently assigned to A. P. Cross, and foreclosed in his name. E. A. Sowles was made a party defendant, and the decree was to become absolute April 26, 1881. For the purpose of protecting himself, said Sowles procured an assignment of the Cross decree to A. Sowles, cashier of the First National Bank, and on April 27, 1881, said bank conveyed the premises to E. A. Sowles, who on the same day conveyed, by quitclaim deed, to McGiff that portion of the land already held by him. Sowles then went into possession of the remainder of the land, and held

it until September 1, 1881, when he conveyed by warranty deed to M. P., C. H., and Lucia Walker one of the remaining houses, together with the lot on which it stood. Said Walkers at once took and are still in possession. In September, 1885, the savings bank began a proceeding to foreclose its mortgage against the entire premises. Sowles by this time had become financially embarrassed, and his interest had been attached. The owners of the several parcels of the land and such attaching creditors were made parties to the foreclosure suit, in which a decree was obtained which was to become absolute October 18, 1886. Previous to the commencement of the foreclosure proceeding, Hall and wife occupied the remaining house, erected by Catherine Mann, and the lot on which it stood. The Walkers applied to Sowles and to Hall and wife to save their house and lot for them, and it was finally agreed that if one Rich would loan three thousand dollars on the house and lot occupied by Hall and wife, Sowles would raise the remainder of the savings-bank decree. Subsequently, with the knowledge of Hall, the following arrangement was substituted and carried out: Rich advanced $2,000, Mrs. Hall $1,000, and Sowles the remainder, to satisfy the bank's claim of $4,250. The bank then deeded the whole property to A. P. Cross, who quitclaimed to McGiff the land held by him, to the Walkers the land held by them, and the balance to Mrs. Hall. She mortgaged to Rich for two thousand dollars. The money furnished by E. A. Sowles belonged to the plaintiff, S. B. Sowles, and was held by him as her trustee. The plaintiff's right of redemption was fixed by an agreement executed October 18, 1886, as follows: —

"In consideration of one dollar to us paid by Susan B. Sowles of St. Albans, we hereby agree to sell and convey to said Susan, or her assigns, certain premises described in a deed from Albert P. Cross to Ida A. Hall, dated October 11, 1886, at any time prior to the first day of January, 1888, upon tender to said Ida A., on or before said date, of the sum of three thousand dollars in money, and unless such tender be made on or before said first day of January, 1888, this agreement shall be absolutely null and void.

"IDA A. HALL. [L. S.]
"BENNETT C. HALL. [L. S.]

"ST. ALBANS, VT., October 18, 1886."

Before January 1, 1888, Sowles applied to Hall for an extension of time on the contract, but was unsuccessful. On

December 31, 1887, the plaintiff tendered to Mrs. Hall one thousand dollars in cash and a good indemnity bond in the sum of three thousand dollars. The tender was not accepted. Defendants had at that time paid $414 on the Rich mortgage, of which fact the plaintiff was ignorant. Catherine Mann's mortgage to E. A. Sowles had never been assigned, but two of the notes secured thereby had been indorsed in blank in 1884 by Sowles, and delivered to the plaintiff, who still held them. This was unknown to defendants when they received their deed from Cross, when they supposed they were acquiring a perfect title. The bill was dismissed *pro forma*, and plaintiff appealed.

E. A. Sowles, for the appellant.

Cross and Start, for the defendants.

ROYCE, C. J. This cause was heard on the pleadings and master's report, from which it appears that the mortgages given to Babbett and to the Ottauquechee Savings Bank were foreclosed, and Edward A. Sowles, who held a subsequent mortgage upon the same premises, was made a defendant in the foreclosure proceedings. Decrees were entered in both of the suits, and the equity of redemption was allowed to expire. Sowles's equitable interest in the agreements subsequently made with the owner of the title by which Sowles acquired the title did not have the effect to reinstate his mortgage as a lien upon the property. If Sowles had an equitable interest in the property, the report shows that he had parted with his interest in all of it except that portion that was deeded to the defendant Ida A.

The oratrix cannot stand upon her ownership of the notes described in the mortgage to Sowles, for the reasons above stated; and if she has any right under the bill to the relief prayed for, it must be upon the ground that she has paid in a part of the amount decreed to be paid to the Ottauquechee Savings Bank, or that she is entitled to a specific performance of the agreement executed October 18, 1886.

Whatever right the oratrix had by virtue of the payment made by her was merged in and settled by the contract of October 18, 1886. Whether that contract is construed as recognizing the right of the oratrix to redeem, or as giving her a right to purchase, the duty which it was made incumbent on her to perform in order to make the contract available was expressed in clear and unambiguous language. By that

contract the defendants agreed to sell and convey to the oratrix or her assigns the premises described at any time prior to January 1, 1888, upon tender to said Ida A., on or before that date, of the sum of three thousand dollars in money; and unless such a tender should be made on or before said January 1, 1888, the agreement was to be absolutely null and void.

The oratrix undertook to make the tender required in the manner reported by the master, but it is not seriously claimed that the tender was a legal one; and no such tender as the contract called for has ever been made. The only importance to be attached to the facts found in relation to the tender that was made is as tending to show a recognition by the oratrix of the necessity for making one.

The right of the oratrix to relief depends upon the construction to be given to the contract executed October 18, 1886, and the acts of the parties under it. The oratrix had no equitable lien by virtue of the assignment of the notes described in the bill; and so the only right she had was the one secured to her by the contract. The contribution made by her to the payment that was made to the Ottauquechee Savings Bank, upon the decree in its favor, did not give her any equitable right to the premises described in the decree, and the contract of October 18th was evidently made to give her an opportunity to reimburse herself for the payment so made by a purchase of the property; and the terms upon which she was to be allowed to make the purchase were clearly and definitely stated. No such tender having been made as was required by the contract, is the oratrix entitled to have a specific performance of it decreed upon the offer made to perform on her part at this time? That depends upon the question whether the time fixed by the parties for the making of the tender is to be regarded as conclusive.

It was held in *Taylor* v. *Longworth*, 14 Pet. 172, that time may be of the essence of a contract for the sale of property, and that it may be made so by the express stipulation of the parties; and a large number of cases are cited in the notes to *Seton* v. *Slade*, in White and Tudor's Leading Cases in Equity, showing that to be the general rule in equity in England and this country. The distinction is noted that has been made on the point of the materiality of time between cases of proposed sale, and of pledge of property, like a mortgage.

It was competent for the parties to make time of the essence of the contract, and they could not have done so in language

more pertinent to express such intention than that used. The agreement was to be absolutely null and void unless the tender was made as agreed. The cases referred to by the counsel for the oratrix have generally been determined upon their peculiar circumstances, and in most of them the courts have found that there was an express waiver of the requirement as to time, or that there was evidence upon which a waiver should be presumed. There is no finding here that there was any express waiver, and although the master has found that E. A. Sowles understood, a short time previous to January 1, 1888, that the time for performance on the part of the oratrix would be extended, the fact is not found that it was extended; and the fact that E. A. Sowles, as counsel for the oratrix, within the time named for the performance of the contract made the tender which it is found that he did make, tends strongly to show that he did not then understand that the time had been extended.

In *Benedict* v. *Lynch*, 1 Johns. Ch. 370, 7 Am. Dec. 484, the contract contained an express stipulation that if the purchaser failed in either of his payments the contract should be void; and it was held that the parties had made time of the essence of the contract, and that it might be laid down as a general rule that where the party who applies for a specific performance has omitted to execute his part of the contract by the time appointed for that purpose, without being able to assign any sufficient excuse for his delay, the court will not decree a specific performance; 3 Pomeroy's Eq. Jur., sec. 457.

No such excuse has been found by the master in this case, and specific performance cannot be decreed. If the oratrix has lost the right to purchase the property, it resulted from her own negligence in not complying with the terms upon which she was to be allowed to exercise it, and she cannot invoke the aid of a court of equity to afford her relief for a loss so incurred.

The decree of the court of chancery is affirmed, and cause remanded.

MORTGAGE, FORECLOSURE OF. — WHO IS CONCLUDED BY THE DECREE OF FORECLOSURE: See *Haines* v. *Flinn*, 26 Neb. 380; 18 Am. St. Rep. 785, and note; *Gaskell* v. *Viqueseney*, 122 Ind. 244; 17 Am. St. Rep. 364, and note.

CONTRACTS OF SALE OF REALTY — TIME AS THE ESSENCE OF THE CONTRACT. — As to when time is of the essence of a contract of sale of real property, see *Cannon River M. Ass'n* v. *Rogers*, 42 Minn. 123; 18 Am. St. Rep. 497, and note; *Cleary* v. *Folger*, 84 Cal. 316; 18 Am. St. Rep. 187, and note; *Day* v. *Hunt*, 112 N. Y. 191; *Canfield* v. *Tillotson*, 25 Neb. 857.

HOGLE *v.* MOTT.

[62 VERMONT, 255.]

PROCESS — NOTICE TO NON-RESIDENT DEFENDANT. — Vermont Revised Laws, sections 1402–1404, providing for service of notice on non-resident defendants, include justices' as well as other courts.

PROCESS. — NOTICE TO NON-RESIDENT DEFENDANT in trustee process in a justice's court, in accordance with the requirements of the statute, is sufficient, and only such further proceedings are needed to reach and hold money in the hands of the trustee as would have been necessary if there had been personal service of the writ.

PROCESS — NOTICE TO NON-RESIDENT DEFENDANT. — Notice by publication or other substituted service, in connection with an attachment by trustee process of property owned by a non-resident, and provided by the law of the state where the property is located, is not in conflict with the Fourteenth Amendment to the constitution of the United States, and is sufficient to support a proceeding and judgment *in rem*.

JUDGMENT WILL NOT BE SET ASIDE on the ground that since its rendition an item embraced therein has, without fraud, been recovered in a suit in another state.

C. G. Austin, for the appellant.

Wilson and Hall, for the respondent.

MUNSON, J. *Audita querela* is brought to set aside a justice judgment in a trustee suit. The defendant in that suit was a non-resident, and there was no personal service of the writ. The case was continued, and an order made that notice be given the defendant by the delivery of copies, as provided in Revised Laws, secs. 1402–1404. On the day appointed, the defendant not appearing, proof of notice in accordance with the order was duly made. The defendant was then defaulted, and judgment was rendered against him and against the trustee.

It is claimed that Revised Laws, secs. 1402–1404, do not apply to justice courts. We think it is clear that they do. These sections are a revision of No. 48 of the acts of 1878. Until the passage of that act, the law was silent as to the manner in which personal notice of the pendency of a suit should be given to an absent defendant. The necessity for some enactment upon this subject was quite as apparent in the proceedings of justice courts as in those of the higher tribunals. The original statute applied to actions in "any court," and there is nothing in the language of the revision which indicates an intention to change the law in that respect. We fail to discover any substantial support for the claim that justice courts are not included. It is true that the

papers are to issue under the hand "of the clerk of the court, or of a judge or justice thereof," and that so much of this clause as relates to the clerk can have no application to justice courts. But the part relating to the clerk is necessary to the convenient operation of the law in courts having a clerk, while the remainder of the clause is a complete provision for courts which have none. Indeed, the expression "a judge or justice thereof" must be held to include the justice court. No force can be given to the word "justice" but by this construction. There is no judicial officer known to our law as a "justice," except the justice of the peace. We could not adopt the construction contended for without considering that the legislature, in referring to certain judicial officers, undertook to make a sufficient designation more unmistakable by adding a term properly applicable only to an officer it was intended to exclude. It would require positive and controlling language in other parts of the statute to bring us to such a conclusion.

Notice to a non-resident defendant in a justice suit in accordance with the requirements of these sections is therefore sufficient. That notice having been given here, only such further proceedings were needed to reach and hold the money in the hands of the trustee as would have been necessary if there had been personal service of the writ.

It is claimed, however, that by this proceeding the non-resident is deprived of his property without due process of law, and that under the fourteenth amendment to the federal constitution the statute authorizing the proceeding is nugatory. The view taken by counsel would require personal service of process in every case of attachment. It is evident that such a requirement would effectually deprive a state of its jurisdiction over the property of non-residents within its territory. It is only by means of some notice other than personal service that the state is enabled through its tribunals to appropriate property so owned in satisfaction of the claims of its citizens. The right of a state to authorize notice by publication or other substituted service in connection with an attachment of property owned by a non-resident has been long and uniformly recognized. This method of procedure, and the rights depending upon it, were not overthrown by the adoption of the Fourteenth Amendment. Notice in such manner as may be provided by the laws of the state where the property is located is sufficient to support a proceeding *in rem*. An attachment by trustee process is such a proceed-

ing. This judgment is of binding force so far as to enable the party recovering it to hold the property found and attached in this state. The question of its validity for any other purpose is not involved: *Price* v. *Hickok*, 39 Vt. 292; *National Bank* v. *Peabody*, 55 Vt. 492; 45 Am. Rep. 632; *Pennoyer* v. *Neff*, 95 U. S. 714; Cooley's Constitutional Limitations, 403; Story's Conflict of Laws, sec. 592 a.

The claim that the judgment should be set aside because of a defense arising since its rendition cannot be sustained. The money for which the trustee was adjudged chargeable was in no way litigated in the suit in New York. The only item recovered in the judgment sought to be set aside which entered into the New York judgment was the one hundred dollars cash paid. This was credited as cash received by the plaintiff in the New York suit, in his specification. The hearing and judgment upon it were subsequent to the judgment against him in this state. Thus he permitted the credit to stand after the item had been included in an adjudication of which he had notice. By so doing, he, in effect, voluntarily paid that portion of the judgment recovered here for which there was no security. This reduction of the claim upon which judgment was obtained in New York does not entitle the plaintiff in that suit to deprive the other party of the prior judgment, by virtue of which he holds the money attached here.

A claim is made that the judgment should be set aside because fraudulently obtained. We consider the matters to which our attention has been directed insufficient to sustain the claim.

Judgment affirmed.

PROCESS — GARNISHMENT. — A resident indebted to a non-resident may be garnished in the courts of the state of the former's residence, and judgment there legally rendered against him that will bind the fund in his hands, even though his non-resident creditor was cited to appear only by publication: *Berry* v. *Davis*, 77 Tex. 191; 19 Am. St. Rep. 748, and note; compare *Harwell* v. *Sharp*, 85 Ga. 124; 21 Am. St. Rep. 149, and note.

HATCH'S ESTATE.

[62 VERMONT, 300.]

HOMESTEAD AND DOWER — WIDOW'S RIGHT TO, UNDER WILL. — A devise by a husband to his wife does not extinguish the widow's right to both homestead and dower, unless such intent clearly appears from the terms of the will; and although it need not appear in express words, still, if it is doubtful, she will not be excluded.

DOWER — PRESUMPTION. — DEVISE OR BEQUEST to a widow is presumed to be in addition to her dower, unless it clearly appears that it was the intention of the testator that it was to be in lieu thereof.

HOMESTEAD — RIGHT OF WIDOW TO, UNDER WILL. — A husband and father cannot by will deprive his widow and minor children of their homestead right, but the provisions of his will may be so clearly expressed to be in lieu of homestead that his widow may be compelled to choose which she will take, and by electing to take the former, renounce the latter.

HOMESTEAD AND DOWER — WIDOW'S RIGHT TO. — Under a will by which a husband, after making two specific bequests, devised the residue of his estate, real and personal, one third to his wife, two ninths to his daughter, and four ninths to his son, the widow will take both her homestead and dower.

HOMESTEAD AND DOWER — WIDOW'S RIGHT TO, UNDER WILL. — Where a widow who is a devisee under her husband's will occupies with her children and carries on the farm in which she claims a homestead for several years after her husband's death, without having either her homestead or dower set out to her, she is not thereby deprived of the right to both homestead and dower in her husband's estate.

APPEAL from a judgment of the probate court ordering dower and a homestead to be set out of the estate of B. B. Hatch.

T. R. Gordon and A. G. Fay, for the appellant.

L. F. Wilbur, for the respondent.

TYLER, J. It appears by the exceptions that the testator, B. B. Hatch, owned a farm, situated in Jericho, which he used as a homestead down to the time of his decease. The question is, whether his widow is entitled to homestead and dower therein, he having made a provision for her in his will, which is as follows:—

"Know all men by these presents, that I, Benjamin B. Hatch of Jericho, in the county of Chittenden, and state of Vermont, being in ill health, but of sound and disposing mind and memory, do make and publish this my last will and testament, hereby revoking all former wills by me at any time heretofore made.

"All the property, real, personal, or mixed, of which I shall die seised and possessed, or to which I shall be entitled at the

time of my decease, I devise, bequeath, and dispose of in the manner following, to wit: —

"My will is, that all my just debts and funeral expenses shall be paid out of my estate as soon after my decease as shall be found convenient.

"I give, devise, and bequeath to my daughter Josie E. Hutchins eight hundred dollars, to be paid her six months after my decease, out of my estate.

"I give, devise, and bequeath to my daughter Ellen L. Hatch eight hundred dollars, to be paid her out of my estate in one year after my decease.

"All the rest and residue of my estate, real, personal, and mixed, of which I shall die seised and possessed, or to which I shall be entitled at my decease, I give, devise, and bequeath as follows: One third to my wife, Mary E.; two ninths to my daughter Lura E., and four ninths to my son, Fred N."

The law so carefully guards the homestead that the sole deed thereof by the husband and father is voidable for the benefit of the wife and children, who have an inchoate right therein: *Whiteman* v. *Field*, 53 Vt. 554. He cannot devise it away from his widow and minor children: *Meech* v. *Estate of Meech*, 37 Vt. 414. It is exempt from attachment on his debts while he lives, except such as were in existence at the time the deed of the homestead was filed for record: *Gilson* v. *Parkhurst*, 53 Vt. 384. It is not subject to the payment of his debts after his decease, unless they were legally charged thereon in his lifetime.

In this case, by virtue of section 1898, Revised Laws, upon the testator's decease the homestead vested in the widow, and if there were minor children, in the widow and such children; and on request, it became the duty of the probate court having jurisdiction of his estate to cause the same to be set out to them by commissioners.

While a husband and father cannot by will deprive his widow and minor children of their homestead right, the provisions of his will might be so clearly expressed to be in lieu of homestead that his widow would be compelled to choose which she would take, and by electing to take the former, renounce the latter. But as was said by Aldis, J., in *Meech* v. *Estate of Meech*, 37 Vt. 414: "The intent to exclude the widow from her legal right must clearly appear; if it be doubtful, she is not to be excluded. It is not necessary that this should appear in express words. If the terms of the instru-

ment clearly and plainly imply it, if there are provisions in the will which are inconsistent with the intent of allowing her homestead, then the court will find the intent to exclude."

The homestead being intended for the benefit of the widow and the children of tender age, "for the sustenance of the wife and the nurture and education of the minor children," a claim thereto, when asserted by them, must be met by unequivocal provisions of the will, in order to bar them of their right.

In this case, the testator could so easily have made the devise to his widow conditional upon her relinquishment of the homestead, or have declared it to be in lieu thereof, that it is at least doubtful whether he did not consider the fact that she would take a homestead by law, and make this devise to her in addition thereto.

Dower and homestead are for the same general object, and are both highly favored in the law. The former may be, but the latter cannot be, defeated by the husband's sole deed. The former, at the decease of the husband, vests in the widow; the latter, in her or the minor children, or both. It was held in *Dummerston* v. *Newfane*, 37 Vt. 9, *Grant* v. *Parham*, 15 Vt. 649, and *Gorham* v. *Daniels*, 23 Vt. 600, that the widow's right of dower becomes a present vested estate on the decease of the husband, which does not depend on the contingency of the dower being assigned or set out. It is consummate by the husband's death. In this respect, homestead and dower stand alike.

The statute (Rev. Laws, sec. 2219) provides that in certain cases the widow may be barred of dower, while there is no statutory mode of barring her and the children of the homestead. It remains to be considered in this case whether the devise was in lieu of dower; whether there was such a clear and manifest intention in the testator, evidenced by the terms of the will itself, that his widow should not have her dower and the devise in addition thereto, that she is bound to choose between them. A widow may be put to her election by a provision in the will of her husband in lieu of dower, or which is inconsistent with dower; for she is not to be suffered to take under the will and also in opposition to it: 1 Bishop on Married Women, sec. 434; 1 Jarman on Wills, 458.

By the rule of the common law, a devise or bequest to a widow is presumed to be in addition to her dower, unless it clearly appears that it was the intention of the testator that it should be in lieu thereof. This is upon the ground that the

wife has an interest in her husband's estate of which she cannot be divested by a bequest or devise, which are considered to be in the nature of gratuities; in other words, a mere gratuity cannot extinguish a legal right.

The question is not what the testator probably intended; it is not for the court to determine, upon all that is contained in the will, whether it is more likely that the bequest was intended to be in lieu of dower or in addition thereto. It must be entirely inconsistent with an intention on the part of the testator that his widow should have dower in his estate.

A case can readily be conceived where a bequest or devise to a widow would be so definite and ample as to preclude the idea that her husband intended she should take the same in addition to dower. If Mr. Hatch had devised to his wife a dwelling-house for a home and lands for a means of support, or made any other definite provision for her, or had devised all his real estate to his children after providing for his wife's maintenance, she might have been compelled to make an election; but the devise to her is an undivided fractional part of the residue of his estate, and less than that to his son. If, after the two bequests of eight hundred dollars, he had given definite sums to his wife and children, and the estate were insufficient to allow dower and pay the bequests, which he presumably knew, there would have been ground for the argument that a claim for dower was repugnant to the devise. It appears by the appraiser's report that the estate consisted of $8,000 in land and $1,550 in personal property, and by the commissioners' report, that the debts proved against the estate amounted to $3,465. After the first two bequests, the testator devised the residue of his estate in such manner that his wife and the children by her take the same fractional parts, respectively, whether she has her homestead and dower or is denied them.

Under the Massachusetts statute, if any provision is made for the widow in the will of her husband, she must, within six months after the probate of the will, make her election whether she will take such provision or be endowed of his lands; but she cannot take both, unless it plainly appears by the will that the testator intended she should have both. This is the reverse of our statute and of the common-law rule, and therefore the decisions in that state are not in point.

By the statute of Connecticut, the provision must be in lieu of dower; but the court has held that it need not be so ex-

pressed in the will, but may be shown by clear implication, thus making the statute of that state, by construction, like our own. Appellant's counsel rely on the case of *Lord* v. *Lord*, 23 Conn. 327, and *Alling* v. *Chatfield*, 42 Conn. 276. In both those cases, however, the intention of the testators to make provision in lieu of dower was apparent. In the former case, in the prefatory part of the will, the testator declared his intention to apportion all the estate that had been intrusted to his stewardship among all persons who had claims on his regard and affection, and that none should enjoy his estate otherwise than as provided in the will. He then gave his wife during her widowhood the use of his dwelling-house, garden, and lot adjoining, one half of the rent of his fishery, the use of one half of his household furniture, twenty shares of bank stock, the income of fifty-seven other shares, a cow, horse, and carriage, and charged upon his home farm the annual delivery to her of certain products thereof ample for her support. It was held that these provisions made for the wife were clearly intended to be in lieu of dower. In the latter case, the provision for the widow was definite and ample, and the allowance of her claim for dower would have defeated an important provision of the will in favor of the testator's children.

Numerous cases have been cited by counsel on both sides, decided by the courts of New York under a statute like that of Connecticut. These decisions vary, of course, according to the provisions of the various wills under consideration. *Adsit* v. *Adsit*, 2 Johns. Ch. 448, 7 Am. Dec. 539, has long been regarded as a leading authority, by reason of the learning of the eminent jurist who gave the opinion and of his extensive examination of cases bearing upon this subject. Samuel Adsit, in his lifetime, owned a large farm and other property. In his will he gave his widow certain household furniture, and left five hundred dollars in the hands of his executors for her support, and devised the residue of his estate to his children and grandchildren. He leased the farm to E. Adsit, and covenanted to sell it to him for six thousand dollars. After his decease his widow accepted the provisions of the will, which were paid to her out of the proceeds of the estate. Within one year after the testator's decease, E. Adsit paid the six thousand dollars to the executors, who conveyed the farm to him. The question was, whether the widow had dower in the farm. Chancellor Kent held that she had, and remarked that there was not a single case that contradicted

the will for a long period of time, has thereby waived her right of dower. It was held in *Barnard* v. *Edwards*, 4 N. H. 321, where a widow moved away from the premises in which her right of dower existed, and married a second husband, that it was proper to submit to the jury as a question of fact whether, after the lapse of more than twenty-five years, she might not have been presumed to have waived her right. In the case at bar, an acceptance cannot be presumed from the fact that for several years after her husband's decease the widow resided with her children on the farm and carried it on; for this was consistent with her claim to homestead and dower, and may have been in the assertion of her right thereto. She could do no more, except to have her homestead and dower defined by metes and bounds. Had the estate been settled and the farm partitioned among the devisees, and she had occupied her share, her acts might have signified an acceptance.

At common law there was no limitation to this right: 4 Kent's Com. 70; and our legislature evidently contemplated no limitation, for section 2224 of the Revised Laws provides that until the dower of the widow is set out in the lands of her deceased husband she may continue to occupy the same with the children and family of the deceased, or may receive one third of the rents, issues, and profits of such lands: See *Holmes* v. *Bridgman*, 37 Vt. 28.

Although the testator declared his purpose to dispose of all the estate of which he should die seised, we hold that the devise to the widow must be construed as intended to be in addition to her legal rights; for in the language of the chancellor in *Adsit* v. *Adsit*, 2 Johns. Ch. 448, 7 Am. Dec. 539, "every bequest can take effect, and every disposition of the will be fulfilled, consistently with the operation of the claim of dower." In this view of the case, there was no occasion for her to waive the provisions of the will.

The judgment is affirmed, and certified to the probate court.

DOWER, WHEN BARRED BY THE PROVISIONS OF WILL. — Dower cannot be barred by the provisions of a will, unless the provisions be expressly given in lieu of dower, and accepted by the widow: *Hall* v. *Hall*, 8 Rich. 407; 64 Am. Dec. 758, and note; or unless her claim of dower would defeat the terms of the will: *White* v. *White*, 16 N. J. L. 202; 31 Am. Dec. 232, and note. Otherwise the widow takes dower in addition to the provisions of the will: *Pollard* v. *Slaughter*, 92 N. C. 72; 53 Am. Rep. 402; *Konvalinka* v. *Schlegel*, 104 N. Y. 125; 58 Am. Rep. 494. The same rule holds good as to the widow's right to a homestead: *Nicholas* v. *Purcell*, 21 Iowa, 265; 89 Am. Dec. 572.

WILLIAMSON *v.* JOHNSON.

[62 VERMONT, 378.]

GIFT MADE PERFECT BY DELIVERY and acceptance, and by a competent party, is irrevocable; but to constitute a gift *inter vivos*, the donor must voluntarily deliver the property and part with all present and future dominion over it.

GIFT IN CONTEMPLATION OF MARRIAGE — REVOCATION OF. — Where a woman receives money from a man for the purpose of carrying out her promise to marry him, and then refuses to keep her promise, without cause, she may be compelled to refund such money in an action of *assumpsit*.

PRACTICE. — AMENDMENT TO DECLARATION which brings in no new party and no new cause of action into the suit is properly allowed.

ASSUMPSIT. Judgment for defendant, and plaintiff appealed.

Hunton and Stickney, for the appellant.

J. B. Phelps and W. E. Johnson, for the respondent.

TYLER, J. It is a general rule of law that a gift by a competent party, made perfect by a delivery and acceptance, is irrevocable by the donor; that to constitute a gift *inter vivos*, the donor must deliver the property and part with all present and future dominion over it. It is a voluntary, gratuitous transfer of personal property by one person to another. A true and proper gift or grant is always accompanied by delivery of possession, and takes effect immediately; as if A gives to B one hundred pounds or a flock of sheep, and puts him in possession of them directly, it is then a gift executed in the donee, and it is not in the donor's power to retract it, though he did it without any consideration or recompense, unless he were under a legal incapacity, as infancy, coverture, duress, or the like, or if he were drawn in, circumvented, or imposed upon by false pretenses, ebriety, or surprise: 2 Bla. Com. 577.

In accordance with this rule, it was held in *Strauffer* v. *Morgan*, 39 La. Ann. 632, that a donation by a man to his intended wife on the eve of their marriage of a check on a banking firm was revocable at any time before actual collection by the donee; but after it had been presented and honored by placing the amount to her individual credit the donation was complete; that the *locus penitentiæ* continued until the delivery was perfected. In the note to *Drew* v. *Hagerty*, 81 Me. 231, 10 Am. St. Rep. 255, it is said that in order to render a gift of money by a grandmother to certain children and their father as their trustee effectual for any purpose, it is not only necessary to show an intention to give, but also an actual delivery

of the thing given; there must be a parting with the possession and all control over the property, and a vesting of the possession in the donee, or in a third person in trust for the donee.

A gift of personal property made with intent to take effect immediately and irrevocably, and executed by complete and unconditional delivery, is binding upon the donor as a gift *inter vivos: Love* v. *Francis*, 63 Mich. 181; 6 Am. St. Rep. 290, and note. See also *In re Crawford*, 113 N. Y. 560.

All the definitions come to this: That to constitute a valid gift, it must be voluntary, gratuitous, and absolute. Applying these tests to the facts relative to the gift of the fifty-five dollars, it is apparent that they fall short of showing a perfected gift of that money in the donee. The court below found the facts that the plaintiff let the defendant Caroline have both sums of money without any expectation that they would be refunded, which was certainly quite natural in the circumstances of the case; that both sums were intended as gifts, and that no conditions were attached thereto. It is further found that the gifts were made in the expectation by both parties of marriage, and that they were given for specific purposes, — the $275 for the purchase of the defendant's marriage wardrobe and the $55 to defray her expenses in coming to this state to be married.

The court would have fully complied with the requirements of the act of 1888 if it had stated the facts in the case without denominating the transaction. That act requires that "in all cases hereafter tried in the county court, where any question of fact shall be tried by the court instead of by a jury, and in which a jury trial might have been had by either party, before any bill of exceptions shall be allowed, the facts found by the court upon which judgment is rendered shall be reduced to writing and signed by a majority of the members of the court and filed with the clerk." If the plaintiff had given or sent these sums of money to the defendant without any direction or designation as to their use as gratuities, they would have been perfected, irrevocable gifts upon delivery. In a general way they were gifts, but in a strict legal sense they were not gifts, though called so by the court, for the reason that they were made in expectation and under an arrangement that they were for specific purposes. The law is well settled that where money is delivered by one person to another for a particular purpose, to which the latter refuses to

apply it, the depositor may recover it back in an action for money had and received: 2 Greenl. Ev., sec. 119; *De Barnales* v. *Fuller*, 14 East, 590, note.

In a valuable note to *Hassar* v. *Wallis*, 1 Salk. 28, it is said: "If one man takes another's money to do a thing, and refuses to do it, it is a fraud; and it is at the election of the party injured either to affirm the agreement by bringing an action for the non-performance of it, or to disaffirm the agreement *ab initio*, by reason of the fraud, and bring an action for money had and received to his use."

In *Berry* v. *Berry*, 31 Iowa, 415, a father gave to his son certain personal property upon the condition that he should keep sober and attend to his business. It was held that, to entitle the donee to claim that the gift was irrevocable and invested him with a right to the property, it must be shown that he had complied with the conditions on which the gift was made. And in *Stewart* v. *Phy*, 11 Or. 335, it was held that *assumpsit* for money had and received would lie to recover money paid by a debtor to his creditor to be applied in satisfaction of a particular obligation, when it was not so applied and the obligation was otherwise discharged.

Several English cases cited by the plaintiff's counsel go beyond the rule above indicated, and hold that marriage gifts, or their value, are generally recoverable of the donee after breach of the engagement by her. In Fonblanque's Equity, section 15, it is said: "But that which helps us most, in the finding out the true meaning, is the reason or cause which moved the will. And this is of the greatest force when it evidently appears that some one reason was the only motive that the parties went upon, which is no less frequent in laws than in facts. And here that common saying takes place, that the reason ceasing, the law itself ceases. So a present made in prospect of marriage may be revoked and demanded back if the marriage does not take effect, especially if it sticks on that side to whom the present is made."

"A made a present of a jewel to a lady whom he courted, but the marriage not taking effect, he brought an action of detinue against her, and she, taking it to be a gift, offered to wage her law; but the court was of the opinion that the property was not changed by this gift, being to a specifical intent, and therefore would not admit her to do it": 14 Vin. Abr., tit. Gift, pl. 7.

The case of *Young* v. *Burrell*, Cary, 77, is as follows: "The

defendant confesseth by her answer the having of a tablet or pomander in gold, demanded by the plaintant; and as to the twenty pounds, likewise demanded by the plaintant, by him left with the said defendant as a token, at such time as he was a suitor for marriage to the defendant, she confesseth the same was left with her against her will, and she delivered the same over unto one Sydole, her brother, who was a dealer with her on the plaintant's behalf, to the end he should deliver the same over to the plaintant. It is ordered that the tablet be forthwith delivered by the defendant to the plaintant, which was done presently in court; and as to the twenty pounds, the plaintant shall call in the said Sydole by process."

In *Robinson* v. *Cummings*, 2 Atk. 409, Lord Chancellor Hardwicke laid down the rule "that if a person has made his addresses to a lady for some time upon a view of marriage, and, upon reasonable expectation of success, makes presents to a considerable value, and she thinks proper to deceive him afterwards, it is very right that the presents themselves should be returned, or the value of them allowed to him; but where presents are made only to introduce a person to a woman's acquaintance, and by means thereof to gain her favor, I look upon such person only in the light of an adventurer." See also 1 Com. Dig. 313.

The case of *Grigys* v. *Austin*, 3 Pick. 20, 15 Am. Dec. 175, bears upon the same rule of law. There freight had been paid in advance upon an agreement for the carriage of goods from Boston to Liverpool, and the goods were not delivered, in consequence of the vessel being stranded. The court said: "It is certainly a clear principle of the common law that when money is paid or a promise made by one party in contemplation of some act to be done by the other, which is the sole consideration of the payment or promise, and the thing stipulated to be done is not performed, the money may be recovered back or the promise founded upon such consideration may be avoided between the parties to the contract. This general principle is the foundation of perhaps the largest class of cases which have been sustained under the action for money had and received."

The $275 stands differently from the $55 in this respect, that it was literally applied to the purpose for which it was given; yet it stands precisely like the $55 in that it was to be applied by the defendant towards the consummation of

the marriage engagement. She received both sums for a specific purpose, and when she broke the engagement the law raised a promise on her part to refund them. The plaintiff did not give them to her "as an adventurer," to help him win her favor, but in consideration of the engagement, and to enable her to perform it. When she broke it he was entitled to have his money refunded. We hold that the gifts were not absolute, but conditional, and that when the condition failed, a right of action accrued to the plaintiff to recover the money. That it may be recovered in *assumpsit* for money had and received is well established in *Wiseman* v. *Lyman*, 7 Mass. 288; *Calais* v. *Whidden*, 64 Me. 249; and *Bates* v. *Quinn*, 56 Vt. 49. This action lies whenever one person has money in his hands which *æquo et bono* belongs to another: *Barnett* v. *Warren*, 82 Ala. 557.

The amendment brought no new party and no new cause of action into the suit, and was therefore properly allowed: *Myers* v. *Lyon*, 51 Vt. 272.

Judgment reversed, and judgment for the plaintiff for both sums, and interest from November 30, 1878.

GIFT INTER VIVOS, WHAT NECESSARY TO CONSUMMATE. — For the essential elements of a valid gift, see *Dougherty* v. *Moore*, 71 Md. 248; 17 Am. St. Rep. 524, and note; *Beaver* v. *Beaver*, 117 N. Y. 421; 15 Am. St. Rep. 531, and note. Delivery is necessary to a valid gift, and such delivery must have been intentional, and be evidenced by an actual change of possession: *Board* v. *Calihan*, 33 W. Va. 209; *Miller* v. *McMechen*, 33 W. Va. 197; *Bingham* v. *Stage*, 123 Ind. 281. Delivery need not be actually made when the donee already has possession of the thing donated: *Bennett* v. *Cook*, 28 S. C. 353.

WEBB *v.* LAIRD.

[62 VERMONT, 448.]

CONTRIBUTION FOR MAINTENANCE OF DAM. — In an action to recover the cost of rebuilding a dam from one who is liable to contribute to its maintenance, recovery may be had in proportion to the sum actually expended in rebuilding in a prudent and diligent manner under the circumstances, although a man of experience with ample means might, under favorable circumstances, have built it for less.

INJUNCTION — DAMAGES. — Where an injunction is wrongfully issued and is framed in ambiguous terms, the defendant therein is entitled to recover such damages as he has sustained in obeying it as he reasonably and in good faith understood it.

BILL in chancery. Plaintiff and defendant each owned mills situated upon the same stream, the defendant being the

upper owner. A dam was located at defendant's mill, which was used to store water for both mills, the plaintiff drawing water therefrom through defendant's flume. In the latter part of 1881, it became necessary to rebuild the dam, and the defendant drew the water out of the pond and began to reconstruct the dam. The plaintiff then brought this bill, averring his right to take water from the pond, the interference of defendant with this right, and praying an injunction, which was granted and served November 3, 1881. At that time the defendant had the dam partly reconstructed and had allowed the pond to partly fill with water, and understanding from reading the injunction that he was forbidden to further proceed with the construction of the dam, or to draw the water in the pond below its original level, he allowed the pond to fill, which caused the dam to break. The defendant, by answer, claimed that he was properly proceeding to reconstruct the dam, and that the injunction was improperly granted; that plaintiff was bound to contribute to the maintenance of the dam, and should be compelled to so contribute in this suit. No cross-bill was filed, but it was agreed that the answer should be treated as one. Upon these issues, the case was heard on the report of a master at the general term, 1886. At this hearing the following mandate was issued: —

"It is ordered and adjudged that the orator under the grant has a right in the water-power created by the dam and pond at the saw-mill proportionate to his relative right to draw water from the same for the use of his grist-mill, and is under the same proportionate duty to contribute to the support and maintenance of the dam and pond at the saw-mill, so long as the orator and defendant continue to exercise their respective rights to the same; that the defendant has a like right and is under a like duty, but that if either party abandons the use of his right, his duty to contribute to the support and maintenance of the dam ceases; that the orator had no right to the injunction procured by him; that the cause is remanded to the court of chancery to have under the mandate the rights of the parties as herein set forth defined, determined, and decreed, and to have a proper account taken, and contribution decreed for the part support of the dam and pond; to have the damages, if any, to the defendant by the injunction ascertained and decreed, and upon such decree being passed, to dismiss the original bill, with costs in this court to the defend-

ant. The costs in the court of chancery are left to the discretion of that court. "JONATHAN ROSS, for the court."

The present reference to a master is under this mandate. The master found that plaintiff's right to the water was .2921 of the whole, in which proportion he was bound to contribute to the expense of reconstructing the dam. He found that defendant actually expended $507.55 in rebuilding the dam and allowed him the above proportion of that sum. He also allowed defendant $205.64 for the damage sustained by him from the breaking of the dam on November 10, 1881. In the fall of 1882, while the injunction was still in force, the defendant, finding it necessary to repair the dam, drew the water from the pond for that purpose on November 8, 1882, and on the next day the plaintiff complained of him for violating the injunction. On November 13, 1882, defendant was arrested, and admitted to bail, leaving the question of the violation of the injunction to be adjudicated with the remainder of the case. On December 15, 1882, the defendant obtained a modification of the injunction, allowing him to make necessary repairs on the dam. He claimed to recover as injunction damages the loss of the use of his mill between the date of his arrest and the date of the modification of the injunction. This item was allowed, subject to the opinion of the court. Judgment for defendant for the several sums allowed by the master, with interest. Plaintiff appealed.

Wing and Fay, for the appellant.

S. C. Shurtleff, for the respondent.

ROWELL, J. The master finds that the defendant built the dam as cheaply as he could in the circumstances and condition in which he was placed, but that it is probable that a man of experience in such matters, with ample means and in favorable circumstances, could have built it for less, but for how much less he is unable to find from the testimony.

The orator claims that this problematical finding affords the true ground of determining the amount that he should contribute for building the dam, and that he is liable for nothing more, because all beyond was occasioned by the defendant's less favorable circumstances.

But the first finding is equivalent to saying that the defendant conducted the business in a diligent and prudent manner in the circumstances; and this was all he was bound to do, in order to entitle himself to contribution to the full

amount of his expenditure. He stands, in this respect, like the innocent party to a broken contract, who can recover all the damage that by diligence and prudence he could not have prevented in the circumstances in which he was placed.

This is the rule laid down in *Eureka Marble Co.* v. *Windsor Mfg. Co.*, 51 Vt. 170, and approved in *Wilson* v. *Greensboro*, 54 Vt. 542. But of course those circumstances must not have been rendered unfavorable for the prevention of damage by any fault, in law, of his.

As to the injunction damages, it is claimed that the dam gave way by reason of the defendant's fault in misconstruing the injunction, and that therefore he is entitled to nothing for repairing it. This court has already said that he complied with the injunction as he had a right to understand it: *Webb* v. *Laird*, 59 Vt. 116; 59 Am. Rep. 699. And when we consider that it is the spirit, and not merely the letter, of an injunction that must be obeyed, we still think that he had a right to understand the injunction as he did, and was not in legal fault in obeying it accordingly.

A party from whom obedience to an injunction is required should be allowed a fair latitude of construction, that he may the more surely avoid the risk of disobedience. If the party obtaining an injunction would be safe from the possible consequences of a construction by the other party that would enlarge the scope of it beyond what he intended it should be, let him see to it that it is made too plain to admit of such construction.

A few cases will illustrate the scope of the spirit of injunctions. Thus an injunction against further proceedings in the collection of an execution enjoins the enforcement of the judgment itself: *Campbell* v. *Tarbell*, 55 Vt. 453. In *Partington* v. *Booth*, 3 Mer. 148, an injunction against taking possession under a verdict obtained in ejectment was held to be violated by procuring an attachment for non-payment of the costs taxed. So in *Grand Junction C. Co.* v. *Dimes*, 17 Sim. 38, an injunction against obstructing the passage of boats along a canal was held to be violated by the bringing of fifteen suits on account of such passage.

The giving way of the dam being due to the defendant's obeying the injunction as he had the right to understand it, he can recover for rebuilding it and for the necessary loss of the use of his mill for the time required to rebuild. It is not found that he was guilty of any unnecessary delay in rebuilding, but on the contrary, that he made such progress therein as he

could, considering the season and the circumstances. Therefore, upon the findings, he is entitled to this class of damages, as found by the master.

On November 8, 1882, the defendant, without notice to the orator, drew all the water from the pond, in order to make needed repairs on the dam and the flume, in the making of which he was unnecessarily slow, as he might have made them in two days, but had not completed them on November 18th, when he was arrested for violating the injunction, and thereby delayed three days, during which time he lost the use of the mill. On December 15th he made written application to a chancellor for a modification of the injunction that would allow him to draw the water down and shut it out of his flume, so that he could repair the gate that let water onto the wheel; and on being shown the application, the orator's counsel at once consented to the modification asked for.

The defendant charges and was allowed for the loss of the use of the mill from the time of his arrest to the time of the modification of the injunction, — thirty days. Of this item it is sufficient to say that it does not appear why he lost the use of the mill longer than the three days he was delayed by the arrest, nor clearly that he did in fact lose it longer; but it rather appears that he did not lose it longer, or certainly not so long as charged, for in his application for a modification, which is made a part of the master's report, he expressly says that "while using his mill on December 11th" his gate got out of place, etc. There are not sufficient facts reported to warrant the allowance of this item, whatever other defense there may be to it, except for the three days' loss on account of the arrest.

Decree reversed, and cause remanded, with mandate.

CONTRIBUTION AMONG PERSONS JOINTLY LIABLE FOR REPAIRS. — As to the rule of contribution among co-tenants for repairs made upon the common property by one tenant in common, see note to *Robinson* v. *McDonald*, 62 Am. Dec. 482–487. For the rule as between the owners of a party-wall, see note to *Bloch* v. *Isham*, 92 Am. Dec. 293, 300, 301. The principle of contribution may be stated thus: Equality of right requires equality of burden: *Campbell* v. *Mesier*, 4 Johns. Ch. 335; 8 Am. Dec. 570.

POSNETT *v.* MARBLE.

[62 VERMONT, 481.]

SLANDER — PRIVILEGED COMMUNICATION. — A statement made to a post-office inspector, in reply to an inquiry by him in reference to an applicant for a post-office appointment, is so far privileged as to protect the party making the communication in good faith, from an honest motive, and without actual malice.

SLANDER — PROOF OF WORDS ALLEGED. — In slander, the plaintiff need only prove the words alleged substantially as laid. He need not prove the precise words.

SLANDER — HOUSE OF ILL-FAME. — Charging one with keeping a house of ill-fame is actionable *per se*.

SLANDER — CHARGE OF CRIME ACTIONABLE PER SE. — Words charging a crime involving moral turpitude, and subjecting the offender to corporal punishment, are actionable *per se*. The place of confinement is immaterial.

SLANDER — SUFFICIENCY OF COUNT. — A count charging slander by accusing plaintiff of keeping a house of ill-fame is sufficient without an averment that plaintiff had a house.

SLANDER — WORDS SUPPORTING INNUENDO. — The words "She keeps a common open house; she is nothing but a whore anyway," — will support the innuendo that she keeps a house of ill-fame.

SLANDER — WORDS NOT SUPPORTING INNUENDO. — The words "My mail won't come into a whore-house," spoken of and concerning plaintiff, to prevent her from obtaining an appointment as post-mistress, will not support the innuendo that she keeps a house of ill-fame, without the further averment that she had a house.

SLANDER — WORDS NOT SUPPORTING INNUENDO. — Words charging plaintiff with keeping a "stinking place"; that her character is not in good standing; and that "she is in the habit of having men come to her house and lounge around and stay for hours at a time," — will not support the innuendo that she keeps a house of ill-fame.

SLANDER — WORDS NOT SUPPORTING INNUENDO. — Words charging a plaintiff in slander with having a venereal disease will not support the innuendo that she keeps a house of ill-fame.

SLANDER — NEW TRIAL, WHERE GOOD AND BAD COUNTS ARE JOINED. — In slander, where the several counts charge the utterance of different words upon separate occasions, and a general verdict is returned, a new trial will be granted where, upon motion in arrest of judgment, some of the counts are found good and the others bad.

SLANDER. The defamatory matter alleged in the different counts was as follows: —

First Count. — "She [meaning the plaintiff] keeps a common open house [meaning that plaintiff kept a common open house of ill-fame]. She [meaning the plaintiff] is nothing but a whore, anyway [meaning that the plaintiff was a common prostitute, and kept a house of ill-fame]; her children [meaning the children of the plaintiff] are all broken out

with sores [meaning it to be understood that the children of the plaintiff were infected with the venereal disease], and would poison the mail if it came there [meaning that said children would handle the mail, and would poison the mail by contact with the poison from this venereal disease, if the plaintiff obtained the appointment as post-mistress at said North Fayston and the mail came to the house of the plaintiff]."

Second Count. — "I [meaning the defendant] will have my mail [meaning the mail coming through the post-office to the defendant] stopped at Moretown [meaning that if the plaintiff was appointed post-mistress as aforesaid, she, the defendant, would have her mail stopped at the post-office at the village of Moretown]; my mail [meaning the mail coming through the post-office to her, the defendant] won't come into a whore-house [meaning that the plaintiff kept a house of ill-fame, and that she, the defendant, would not have her mail come through the post-office at said North Fayston if the said plaintiff obtained the appointment to the office of post-mistress as aforesaid]."

Third Count. — "I [meaning the defendant] do not think it [meaning the dwelling-house of the plaintiff] a fit place for the mail to go, to any such stinking place [meaning that the plaintiff kept a low house of ill-fame, and that her house was not a fit place for people to go to get the mail which came to them through the post-office]." Thereafterwards, in answer to the question by said Chase, "Why, are you afraid of any disease, of taking it, or getting poisoned?" the defendant falsely and maliciously spoke and published of and concerning the plaintiff, in the hearing and presence of the said Chase, and of other good and worthy citizens of this state, the false, scandalous, malicious, and defamatory words following, that is to say: "Yes, that is one objection [meaning that the fear of getting poisoned from the venereal disease was one objection to the plaintiff being appointed to the office of post-mistress as aforesaid] and it [meaning the dwelling-house of the plaintiff] is no place for it [meaning that the dwelling-house of the plaintiff was no fit place for the post-office]." Said Chase then asked the question as follows: "Why, is the character of Mrs. Posnett not in good standing?" To which question the defendant, in the presence and hearing of the said Chase, and of other good and worthy citizens of the state, falsely and maliciously spoke and published of and concerning the plaintiff the false, scandalous, malicious, and defama-

tory words following; that is to say: "I [meaning the defendant] do not think she [meaning the plaintiff] is [meaning that she did not think that the character of the plaintiff was good]." Said Chase then asked the defendant the question as follows: "Is she [the plaintiff] in the habit of having men come there to her house and lounge around and stay for hours at a time?" In answer to which question the defendant, in the presence and hearing of the said Chase, and of other good and worthy citizens of this state, falsely and maliciously spoke and published of and concerning the plaintiff the false, malicious, scandalous, and defamatory words following; that is to say: "I [meaning the defendant] am sure she [meaning the plaintiff] does that [meaning that the defendant was sure that the plaintiff had men around there, the plaintiff's house, for hours for the purpose of sexual intercourse with the plaintiff]. She [meaning the plaintiff] has men enough there [meaning at the house of the plaintiff] most any time [meaning it to be understood and believed that the plaintiff kept a house of ill-fame, and had men there at any and all times for the purpose of prostitution and to have sexual intercourse with the plaintiff]."

Fourth Count. — "Mrs. Posnett [meaning the plaintiff] keeps a house of ill-fame [meaning that the plaintiff was guilty of the crime of keeping a house of ill-fame], and all of the boys have what they want of her [meaning that the plaintiff was a common prostitute, and that she kept a house of ill-fame, and that all the men and boys went to the house of the plaintiff, and had sexual intercourse with the plaintiff whenever they wished], and I can prove it [meaning that she, the defendant, could prove that the plaintiff kept a house of ill-fame]; and she [meaning the plaintiff] will steal [meaning that the plaintiff was guilty of the crime of theft], and lies [meaning that the plaintiff was untruthful and would tell lies]."

Fifth Count. — "It's imposing on the community to have the mail go to any one as rotten as she [meaning the plaintiff] is [meaning thereby that the plaintiff kept a house of ill-fame and was a common prostitute, and had thereby contracted the venereal disease, and that the plaintiff was all rotten with said disease]; she [meaning the plaintiff] is all rotten with the pox [meaning that the plaintiff had contracted the venereal disease, and was rotten with the same]."

Judgment for plaintiff, and defendant appealed.

George Wing, W. P. Dillingham, and E. A. Heath, for the appellant.

Heath and Fay, and Senter and Kemp, for the respondent.

MUNSON, J. The plaintiff was an applicant for appointment as post-mistress at the North Fayston office. The defendant's husband was an applicant for the same position. One Chase, a post-office inspector, was engaged in inspecting this office. While so engaged he procured the defendant's attendance at the office, and questioned her in regard to the plaintiff. The defendant at first declined to say anything about the plaintiff, whereupon Chase told her it was his business, as inspector, to make the inquiry, and her duty to give him the information. The defendant then had a conversation with Chase concerning the plaintiff, in which it was claimed she used the words set forth in the third count. The testimony offered in proof of what the defendant said was objected to on the ground that the communication was privileged. The court received the evidence, but told the jury, in submitting the case, that the occasion was, in a sense, privileged; and further instructed them that if the defendant said what she did in good faith, and without malice, she would not be liable; but that if she improved the occasion to maliciously make false charges against the plaintiff, she would be liable therefor. To such admission of evidence and to this part of the charge the defendant excepted.

The plaintiff was an applicant for appointment to a public office. In view of her application, her character was a matter of public concern. The defendant was a member of the community immediately interested in the result of the application. Her conversation was with one who, she might naturally suppose, could prevent the appointment. The circumstances were such as to justify the defendant in communicating what she honestly believed as to the plaintiff's conduct and character. The selection of suitable persons for the performance of official service is essential to the interests of both the government and the citizen. These interests can be protected only by the communication of information and by free discussion concerning the fitness of applicants. It would tend to repress this necessary freedom, and would be a manifest injustice to the citizen, if communications of this character subjected the person making them to the payment of damages in the event of an honest mistake. But these considerations

disclose no necessity for a privilege broad enough to cover charges which are unfounded and malicious. A just distinction is established, and reasonable protection afforded to every interest, by holding communications of this nature to be *prima facie* privileged. By virtue of this privilege, a defendant who has made a statement which cannot be substantiated is relieved from the effect of a legal presumption of malice, and is made liable only by proof of actual malice. The occasion in question was not one of absolute privilege, but was so far privileged as to protect a communication made in good faith, and from an honest motive. The testimony objected to was properly admitted, and the charge of the court as to the nature and limitation of the privilege was correct: Townshend on Slander and Libel, sec. 209; 1 Am. Lead. Cas. 166.

The plaintiff was permitted to show, by the person who served the writ, what the defendant said on hearing it read. This was under objection and exception. The exceptions show what counsel anticipated the testimony might be, but do not state what the testimony was. In the charge it was treated as testimony to admissions of the defendant, and no exception was taken to this as unwarranted by the evidence. The exceptions disclose no error.

The defendant excepted to the charge as to the degree of precision required in establishing the defamatory words. The court first instructed the jury that the plaintiff must prove the words alleged in the declaration substantially as laid, and afterwards said it was not necessary that they should find the defendant used the precise words alleged, but that they must find the charge was made substantially in the words set forth. This is in accord with the rule deduced from the authorities and laid down in *Smith* v. *Hollister*, 32 Vt. 695. We think it was sufficiently explicit. It left no room for the jury to suppose that proof of other words of substantially the same meaning would entitle the plaintiff to recover.

Several points are made under the motion in arrest. No special damages were shown. The words charging the disease were justified, the plaintiff conceding the fact. The case stood upon the charge of keeping a house of ill-fame. It is urged that words charging one with keeping a house of ill-fame merely are not actionable *per se*. The statute provides for the punishment of one who keeps "a house of ill-fame, resorted to for the purpose of prostitution or lewdness." The innuendo in each count explains the words spoken as meaning to charge

the plaintiff with keeping "a house of ill-fame," without using the further words of the statute. It is said there are several kinds of houses of ill-fame, and that, as the matter is left by the pleader, the words must be taken to mean a house of ill-fame of a more innocent character that the one described in the statute. Both at common law and in common language the term "house of ill-fame," without words giving it a special application, means a house resorted to for prostitution. Bouvier defines a house of ill-fame to be "a house resorted to for the purpose of prostitution and lewdness." Thus to charge one with keeping a house of ill-fame is to charge the exact offense punished by our statute. The innuendo is sufficient in this respect, unless it is necessary, in alleging that a statutory offense was intended, to use the entire language of the statute. We do not think this strictness is required.

It is further insisted that if the words are sufficient to charge the crime described in the statute, the punishment of the crime is not an infamous one, and that the words are therefore not actionable. This claim is in view of the fact that by the statute of 1884 the punishment was changed from imprisonment in the state prison to imprisonment in the house of correction. But it is sufficient if the punishment is corporal; the place of confinement is not the test. The crime charged is one that involves moral turpitude and subjects the offender to imprisonment, and the words are therefore actionable: *Redway* v. *Gray*, 31 Vt. 292.

It is also objected that in neither count is there an averment that the plaintiff had a house. As regards the first and fourth counts, in which the defendant is charged with using words directly denoting the possession of a house, this is no defect. When the slanderous words themselves import the existence of the thing, it is not necessary to aver its existence: Townshend on Slander and Libel, sec. 308, note; 1 Chitty's Pleading, 403. The slander is the same whether the falsity of the charge relates only to the character of a house or includes the existence of one.

The defamatory words relied upon in the first count are: "She keeps a common open house; she is nothing but a whore, anyway"; and the meaning assigned is, that she kept a house of ill-fame. The question is not, as assumed by the defendant, whether this is the only natural meaning of the words "common open house." In determining the meaning of this particular phrase, the language used is to be taken together,

and the question, then, is, What might the person to whom the words were spoken have properly taken them to mean? Might they not, without other aid, have naturally conveyed the meaning assigned by the innuendo? If so, the words are legally susceptible of the meaning charged, and the count is sufficient after verdict. The charge of keeping a common open house, standing alone, could not support an innuendo that a house of ill-fame was meant, without the aid of special prefatory averments. But when it is said of a woman who in the same connection is declared to be a prostitute that she keeps a common open house, we think the words are legally susceptible of the meaning here ascribed to them; and the jury has found by its verdict, that they were used by the defendant in that sense.

The important words of the second count are: "My mail won't come into a whore-house." The term used to indicate the character of the house is, in common language and acceptation, synonymous with the term used in the statute. But the defamatory words have no apparent connection with the plaintiff or her affairs, and their application must fully appear from the antecedent averments and colloquium. It is averred that the plaintiff was an applicant for appointment as postmistress, and that the defendant spoke the words of and concerning the plaintiff to prevent her obtaining such appointment. We think there should have been also an averment that the plaintiff had a house, and that the colloquium should have been framed to include it. Here the charge is made by an indirect reference, and the possession of a house is only implied.

In the third count, the defendant is charged with having referred to the plaintiff's house as a "stinking place," and an unfit place for the mail. This is alleged to have been followed by a question and answer as to the possible communication of some disease. The subsequent conversation is set forth as follows: "Why, is the character of Mrs. Posnett not in good standing?" "I do not think she is." "Is she in the habit of having men come there to her house, and lounge around and stay for hours at a time?" "I am sure she does that. She has men enough there most of the time." We think an innuendo which ascribes to the defamatory language of this count the meaning that the plaintiff kept a house of ill-fame goes beyond the fair import of the words. The words relating to the presence of men at her house are not in

themselves sufficient to carry this meaning, and there is no direct charge touching the plaintiff's character for chastity to give them aid.

The objections to the fourth count are confined to the points, already considered, in relation to the description given the offense in the innuendo and the want of an avernment that the plaintiff had a house.

The defamatory words of the fifth count charge the plaintiff with having a venereal disease. There is not a further suggestion in the language. It utterly fails to justify the innuendo that the plaintiff kept a house of ill-fame.

The several counts purport to be for words spoken upon different occasions. A general verdict was rendered upon all the counts. The second, third, and fifth counts are held to be insufficient, and the court has no means of determining upon which counts the damages were in fact assessed.

This being the situation, what disposition shall be made of the case? The courts are not agreed as to the procedure. One course is to end the suit by arresting the judgment. Another course is to award a *venire de novo*. In *Haselton* v. *Weare*, 8 Vt. 480, the court arrested the judgment, saying that this was in accordance with the settled rule in England. The court had before it English cases in which this course had been taken, but the English practice up to that time was far from uniform, and the other method has since prevailed. One of the cases relied upon by the court in *Haselton* v. *Weare*, 8 Vt. 480, was *Holt* v. *Scholefield*, 6 Term Rep. 691. But this case was expressly overruled by *Leach* v. *Thomas*, 2 Mees. & W. 427, soon after *Haselton* v. *Weare*, 8 Vt. 480, was decided. In *Leach* v. *Thomas*, 2 Mees. & W. 427, it was said that this point did not appear to have been at all argued in *Holt* v. *Scholefield*, 6 Term Rep. 691; and in *Corner* v. *Shew*, 4 Mees. & W. 162, Parke, B., in stating that the point had been considered doubtful before the decision of *Leach* v. *Thomas*, 2 Mees. & W. 427, expressed surprise that such a doubt should have existed, inasmuch as the matter had been provided for by rules of court in both the king's bench and the common pleas as early as 1654. In *Empson* v. *Griffin*, 11 Ad. & E. 186, the court of queen's bench followed the decision in *Leach* v. *Thomas*, 2 Mees. & W. 427, and awarded a *venire de novo*.

The rule adopted in *Haselton* v. *Weare*, 8 Vt. 480, has never been cordially approved. In *Wood* v. *Scott*, 13 Vt. 42, the court considered the question settled, but Redfield, J., referred

with evident sympathy to the regret expressed by Lord Mansfield in *Peake* v. *Oldham*, Cowp. 275, that such a rule had been established. In *Camp* v. *Barker*, 21 Vt. 469, and in *Whitcomb* v. *Wolcott*, 21 Vt. 368, the court vigorously criticised the rule, and indicated its intention to make all reasonable intendments in favor of a verdict, when some of the counts were good. In the latter case, the court referred to the modern English practice of awarding a *venire de novo*, where it could be done, as the true course, but considered that this could not well be done in a court of error. In *Joy* v. *Hill*, 36 Vt. 333, the motion in arrest was disposed of on the ground of a misjoinder of counts, the question whether the expressions in more recent cases had abrogated the law as declared in *Wood* v. *Scott*, 13 Vt. 42, being recognized, but not considered. In 1865, the difficulty was removed by statute, as far as declarations containing only counts for the same cause of action are concerned: Rev. Laws, sec. 913. In *Dunham* v. *Powers*, 42 Vt. 1, and in *Kimmis* v. *Stiles*, 44 Vt. 351, decided since this enactment, the counts not being for the same cause of action, it was considered that judgment should be arrested.

In view of the misapprehension under which the rule was adopted, the position afterwards taken in regard to it, and the modern vindication in the English courts of the earlier and better practice, we are inclined to extend the benefit of a new trial to cases like this. Upon a mistrial of this character, we think the law may conveniently and properly give the litigants a more substantial justice than is afforded by an arrest of judgment. That the proposed action may properly be taken by this court is apparent from the settled practice of many courts of error. The nature of the proceeding is fully stated in *Corner* v. *Shew*, 4 Mees. & W. 162, above cited. The theory is, that the defect is in the verdict. The order is made, in the language of the ancient rule, "as upon an ill verdict." By sending back the case an opportunity is given to have the damages assessed upon the good counts only. The plaintiff will also be entitled to the usual privileges of amendment under the rules of the trial court.

Judgment reversed. New trial granted on condition that plaintiff pay defendant's costs heretofore incurred in the court below, and take no costs for that time in the event of a final recovery; and if a new trial is not desired upon these terms, plaintiff to become nonsuit. Cause remanded.

SLANDER — WORDS ACTIONABLE PER SE. — As to what words are slanderous and actionable *per se*, see *Moraues* v. *Brooks*, 151 Mass. 567; 21 Am. St. Rep. 474, and note.

SLANDER — PRIVILEGED COMMUNICATIONS. — As to what communications are to be regarded as privileged, see *Byam* v. *Collins*, 111 N. Y. 143; 7 Am. St. Rep. 726, and note; note to *Shurtleff* v. *Stevens*, 31 Am. Rep. 706–715; note to *Vanderzee* v. *McGregor*, 27 Am. Dec. 158.

SLANDER — INNUENDO. — Upon the subject of the office and nature of the *innuendo*, see note to *Van Vechten* v. *Hopkins*, 4 Am. Dec. 349–354; *Hayes* v. *Press Co.*, 127 Pa. St. 642; 14 Am. St. Rep. 874, and note.

CASES

IN THE

SUPREME COURT

OF

WASHINGTON.

ANDREWS *v.* KING COUNTY.

[1 WASHINGTON, 46.]

FRAUD, SUFFICIENT ALLEGATION OF. — A complaint alleging facts which, if proved to be true, would establish fraud as a conclusion of law sufficiently alleges fraud, without a specific declaration that such facts are fraudulent.

TAXATION — WHEN UNEQUAL AND NOT UNIFORM. — A rule by which an assessor uniformly assesses mortgages unaccompanied by other evidence of indebtedness at their par value, and the land and other property mortgaged at from one fourth to one fifth of its cash value, is in contravention of the constitutional provision that "all taxes shall be uniform, and that the assessment shall be according to the value of the property."

INJUNCTION TO RESTRAIN UNEQUAL TAXATION. — While equity will not interfere to correct mere mistakes or inadvertences, or to contravene or set aside the judgments of assessors or boards of equalization in relation to values, it will interfere when the officers fraudulently, capriciously, or tyrannically refuse to exercise their judgment by adopting a rule or system of valuation designed to operate unequally and to violate a fundamental principle of the constitution.

APPLICATION for an injunction to restrain a levy upon and sale of household goods and other property to satisfy a delinquent tax, with penalty and costs. A demurrer to the bill was sustained, judgment entered dismissing the bill, and plaintiff appeals.

W. R. Andrews, for the appellant.

Stratton and Fenton, *and J. T. Ronald*, for the appellees.

DUNBAR, J. In the investigation of this case there are three leading propositions to be considered, viz.: 1. In order to put in issue the question of fraud, is it necessary to allege, in terms,

that defendants were guilty of fraud? 2. Conceding the allegations in the complaint to be true, are the facts there stated sufficient to establish a *prima facie* case of fraud? 3. Had plaintiff any other remedy than the one invoked?

So far as the first proposition is concerned, we are clearly of the opinion that if the complaint allege a state of facts which, if proved to be true, would establish fraud as a conclusion of law, that it is a sufficient allegation of fraud; and that the declaration of the pleader that such acts were fraudulent is in no wise essential or necessary to put the question of fraud in issue.

In the other two propositions, which we will consider in some degree together, grave questions are presented,—questions the importance of which demand of the court painstaking investigation, and the rightful determination of which is not so important in view of the amount of money involved in the particular case as it is in view of the effect which such determination will have both on the rights of the individual citizen and upon the state in the determination of its laws.

The principal contention of the plaintiff, and the one to which the court will address itself especially (the determination of which will be conclusive in this case) is, that the assessor uniformly and persistently, intending to injure and oppress all persons holding mortgages, of which there was a large class in King County, and especially this plaintiff, and intending to relieve persons owning lands and other property in King County, outside of mortgages, of their just burden in maintaining the public revenue, assessed mortgages which were unaccompanied by any other evidence of their indebtedness at their par value, without any regard to the valuation placed by him upon the lands mortgaged to secure the payments of said demands, while he, at the same time, refused to assess lands in said King County at more than one fourth their cash value, and refused to assess other property at more than from one fifth to one fourth of its cash value; and alleges the fact to be that he assessed plaintiff's mortgage at thirty thousand dollars, while he assessed the identical land pledged to the payment of the said demand of thirty thousand dollars at only two thousand dollars, notwithstanding plaintiff's said mortgage was not accompanied by any other evidence of indebtedness; and that the plaintiff's remedy upon his said demand will be entirely exhausted by a foreclosure of said mortgage and a sale of the lands, tenements, and hereditaments pledged to

him therein; and that the action of the assessor in such alleged discrimination was indorsed and confirmed by the board of county commissioners of said King County while sitting as a board of equalization; which said action of the assessor and board of equalization, plaintiff claims, was in violation of section 1924 of the Revised Statutes of the United States, which declares "that all taxes shall be equal and uniform, and no distinctions shall be made in the assessments between different kinds of property, but the assessment shall be according to the value of the property."

No doubt the essential idea of the statute is, that each person shall pay a tax in proportion to the value of his property. And the fact that plaintiff's property is admitted to be assessed at its par value will not deprive him of the constitutional guaranty, if by the undervaluation of other property he is compelled to bear more than his just proportion of the burden of taxation.

If A is the owner of property of the value of one thousand dollars which is assessed at one thousand dollars, and B is the owner of property worth one thousand dollars which is assessed at five hundred dollars, the practical result to A is the same as though B's property had been assessed at its value of one thousand dollars, and his property at an overvaluation, or at two thousand dollars. In either case the resulting injury is the same; he has been subjected to double the burden that B has, while actually possessing the same amount of property. The just principle of taxation is equally violated in both cases; and the constitutional mandate that "all taxes shall be equal and uniform, and that the assessment shall be according to the value of the property," is equally ignored. And when such an abuse of official discretion affects a large class of individuals, it will be subject to the law's revision. In view of the inconvenience to the public which will arise from any derangement in the system of the collection of taxes, the law will not regard accidental omissions or minor mistakes. Nor will courts of equity interfere to correct errors in judgment as to valuation, because, as has been well said by Judge Cooley, "value is matter of opinion, and when the law has provided officers upon whom the duty is imposed to make the valuation, it is the opinion of those officers to which the interests of the parties are referred." But according to the same learned author, "it is possible, however, that there may be circumstances under which the action of the officers will not be conclusive": Cooley on Taxation, 218. And one of those circumstances is

where the officer refuses to exercise his judgment, and by an arbitrary and capricious exercise of official authority seeks fraudulently to defeat the law, instead of enforcing it. In such a case the tax-payer will not be left completely at the mercy of the assessor.

In this case, if the averments of the complaint are true, and the assessor uniformly taxed mortgages at their par value, and land and other property at from one fourth to one fifth of its cash value, and, in accordance with such uniform rule of assessment adopted by him, assessed the plaintiff's mortgage, which was unaccompanied by any other evidence of indebtedness, at thirty thousand dollars, and the identical land mortgaged for the payment of the said thirty thousand dollars at only two thousand dollars, the conclusion is inevitable that the honest judgment of the officer was not exercised, and that a rule or system of valuation was adopted by the assessor, and confirmed by the board of equalization, which was designed to discriminate unfairly against one class of tax-payers, and which was in plain contravention of the constitutional law which provides that "all taxes shall be uniform, and that the assessment shall be according to the value of the property." The principles involved in this case were passed upon by the supreme court of the United States in the case of *Cummings* v. *Merchants' Nat. Bank*, 101 U. S. 153, which is a leading case, and must be regarded as settling the law there enunciated. In that case, the Merchants' National Bank of Toledo filed its bill in equity to enjoin the treasurer from collecting a tax wrongfully assessed against its stockholders, alleging that in the valuation of said shares they were estimated at a much larger sum in proportion to their real value than other property in the same city, county, and state. It is true that this decision was rendered under a statute of the state of Ohio providing for such a manner of assessment as was complained of, and providing expressly for an injunction against the collection of a tax illegally assessed. But as expressive of the opinion of the court, in rendering its decision, it says: "Independently of this statute, however, we are of the opinion that when a rule or system of valuation is adopted by those whose duty it is to make the assessment, which is designed to operate unequally and to violate a fundamental principle of the constitution and when this rule is applied not solely to one individual, but to a large class of individuals or corporations, that equity may properly interfere to restrain the operation of this unconstitu-

tional exercise of power." The case at bar is a stronger one than the case which called forth that opinion; for in that case no actual fraud or capriciousness on the part of the officers, or intent to unjustly discriminate, was claimed, the assessment being made under the provisions of a statute the constitutionality of which was in question. And Mr. Chief Justice Waite, in rendering a dissenting opinion, inferentially affirms the position taken by us when he says: "The valuation as finally fixed by the proper officers or equalizing board, under the law, is, in my opinion, conclusive when there has been no fraud, as it seems to me this case comes within the operation of this principle."

In *State Railroad Tax Cases*, 92 U. S. 575, cited by both plaintiff and defendant, and largely relied upon by defendant in the argument of this case, and as stated by counsel for defendant the case on which the court below decided this case adversely to plaintiff's interest, we can see no enunciation of the law which is not in harmony with the view taken by plaintiff in this case. There the contention of the plaintiff was, that the statute of Illinois, and the rule adopted by the board of equalization under the statute, was not in conformity with the principles of uniform taxation. The great point in this case, as stated by the attorney-general, was the alleged unconstitutionality of the act creating the board of equalization, and it was not contended that the action of the board was not in accordance with the statute. Hence there was eliminated from this case any question of fraud by the officers in refusing to exercise their discretion; and the rule prescribed by the board in this case was for the very purpose of ascertaining the fair cash value of the capital stock and franchise of the railroad companies. If there was an error, it was simply an error of judgment; in fact, it can be readily gathered from the opinion of the court that it did not think there had been even an error of judgment, either by the board of equalization or the legislature. Justice Miller, in rendering the opinion of the court, says: "The statute of Illinois, and the rule adopted by the board of equalization, under the power conferred by the clause we have just recited may not be the wisest mode of doing complete justice in this difficult matter; but we confess we had, on the whole, seen no scheme which is better adapted to effect the purpose, so far as railroad corporations are concerned, of taxing at once all their property, and of mak-

ing the tax just and equal in its relation to other taxable property."

This court cannot say as much for the rule adopted by the assessor of King County. On the other hand, it would be hard to conceive of a rule less liable to make the taxation of mortgages just and equal in its relation to other taxable property. The court, in the case above cited, further says, before an injunction will be granted to restrain the collection of taxes, that "there must be an allegation of fraud; that it creates a cloud upon the title; that there is an apprehension of a multiplicity of suits, or some cause presenting a case of equity jurisdiction"; plainly inferring that if one of these stated cases did exist, that the case would be brought within one of the recognized rules of equity jurisdiction. It also states the doctrine that no injunction can be granted until it is shown that all the taxes conceded to be due, and which the court can see ought to be paid, have been paid. The complaint in this case shows that such an amount of taxes has been paid and tendered by plaintiff.

In *Weeks* v. *City of Milwaukee*, 10 Wis. 242, in a case nearly parallel with this, and under the constitutional provision that "the rate of taxes shall be uniform," the court decided that where the taxes on the land of one citizen had been illegally increased by reason of the illegal exemptions of other lands from taxation, an injunction will be granted to restrain the sale of such lands for the payment of such illegal taxes. In that case, the complaint showed that the Newhall House and the land on which it stood had been purposely exempted from taxation, and as plaintiff alleged, unjustly increasing his proportion of tax. It is true that this exemption only went to city taxes; but the decision was based on the broad principle of uniform taxation, and of the rights of individuals under that constitutional principle. The supreme court reversed the order of the lower court in refusing the injunction, and Justice Paine, in rendering the opinion of the court, says: "I have no doubt this exemption originated in motives of generosity and public spirit. And perhaps the same motives should induce the tax-payers of the city to submit to the slight increase of the tax thereby imposed on each, without questioning its strict legality. But they cannot be compelled to. No man is obliged to be more generous than the law requires, but each may stand strictly upon his legal rights." That the property in the above-cited case was wholly exempted from taxation,

and the property in the case at bar only partially exempted, makes no difference in principle; it is only a difference in degree. Substantially the same announcement of the law governing such cases was made in the case of *State* v. *Central Pacific R. R. Co.*, 7 Nev. 99. It was urged by defendant that the taxation in other counties in the state might be rendered ununiform by any interference with the value of plaintiff's property as fixed by the assessor. This would be a subject for the attention of a board of equalization, which the state has a right to provide for by legislative enactment, and which could make intercounty laws or regulations to secure uniformity of assessment between the counties. But no such officers exist in this state, and a failure of the state to provide for such a tribunal will not militate against the rights of the individual which are guaranteed to him by the laws of the state and the constitution or organic act.

We think the uniform ruling of the higher courts has been that while equity will not interfere to correct mere mistakes or inadvertences, or to contravene or set aside the judgments of assessors or boards of equalization in relation to values, it will interfere when the officers fraudulently, capriciously, or tyrannically refuse to exercise their judgment by adopting a rule or system of valuation designed to operate unequally and to violate a fundamental principle of the constitution.

We believe that the provisions of the statute in relation to the manner of making assessments as set forth in section 2832 of the code are mandatory, and must be observed by the assessor. Applying the law as we believe it to be to the facts in this case as shown by the complaint, which is the only statement of facts in the case, we are of the opinion that plaintiff was entitled to the remedy prayed for, and that defendant's demurrer should have been overruled, and the case tried upon the allegations of the complaint.

The judgment of the court below is reversed, and the case remanded for further proceedings in accordance herewith.

FRAUD — PLEADING. — In pleading fraud, the facts constituting the fraud must be specifically set forth: *People* v. *Healy*, 128 Ill. 9, 15 Am. St. Rep. 90, and note, *Bickle* v. *Irvine*, 9 Mont. 251, *Conant* v. *National State Bank*, 121 Ind. 324; in plain and concise language: *Woodroof* v. *Howes*, 88 Cal. 184. Where the petition does not allege fraud and specify the facts which constitute it, no relief can be had based upon fraud: *Southall* v. *Farish*, 85 Va. 403. A plaintiff by abundant allegations cannot enlarge a mere breach of contract into a fraudulent transaction so as to confer jurisdiction over defendants upon the court of the place of the contract: *Burnes* v. *Mensing*, 75 Tex. 200.

TAXATION. — INJUNCTION, WHEN MAY ISSUE TO RESTRAIN THE COLLECTION OF TAXES: See note to *Williams* v. *County Court*, 53 Am. Rep. 110–113; note to *White* v. *Stender*, 49 Am. Rep. 287–289; note to *Holland* v. *Mayor*, 69 Am. Dec. 198–205.

OREGON RAILWAY AND NAVIGATION CO. *v.* SMALLEY.

[1 WASHINGTON, 206.]

CONSTITUTIONAL LAW — RAILROADS KILLING STOCK — FENCES — DUE PROCESS OF LAW. — In the absence of a statute making it the duty of railroad companies to fence their tracks, a statute making such companies liable for live-stock killed by them on their unfenced tracks, without regard to their own negligence or the possible contributory negligence of the owner of the stock, is unconstitutional and void, as imposing a penalty without a wrong, and taking property without due process of law.

W. W. Cotton, for the appellant.

STILES, J. This was an action against a railroad company for the value of a colt killed by a train of the company, and for injuries to another colt by the same train.

The complaint alleged facts which, if proven, would have been sufficient to warrant a recovery at common law, and the answer put in issue all its material allegations. At the trial, however, both the plaintiff and the court appear to have regarded it as a case prosecuted under the act of November 28, 1888. Accordingly, the testimony of the plaintiff was limited to the facts of ownership, the killing and maiming, the want of a fence along the track, and the value and damage. The defendant offered to show that its train was managed without fault, and that the plaintiff's negligence contributed to the accident; but the court rejected the evidence as being irrelevant and immaterial, and this ruling was excepted to.

It did appear, however, that the animals had strayed into a fenced field, not the property of their owner, and that from that field, which extended to the railroad track, they had gone upon the track at the point where they were struck by the train.

The defendant requested a number of instructions to the jury which would have been applicable in the absence of any statute, but the court refused to give them, and did give the following: "Railroad companies owning or operating lines of railway within this territory are liable for the value of all live-stock killed or maimed by their passing trains, where their roads are not fenced."

Exceptions were taken to the refusal to give the instructions asked, and to the giving of the instruction noted above. Error is assigned upon all the exceptions.

This case brings this court squarely to a review of the act of 1883, commonly known as the "fence law," and of the case of *Dacres* v. *Oregon R'y & Nav. Co.*, 1 Wash. Ter. 525. The court in that case, and the parties there and here, decided and admitted that sections 2, 3, 4, 5, 6, and 7 of the act were unconstitutional, because they deny the right of trial by jury; but in response to its own question, "Is the whole act void by reason of the unconstitutionality of the sections named?" the court answered in the negative, and upheld the first and eighth sections as valid and binding law, "being complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected," as the court said. The ruling was based upon the general principle as stated by Judge Cooley's Constitutional Limitations, 5th ed., 212, thus: "Where, therefore, a part of a statute is unconstitutional, that fact does not authorize courts to declare the remainder void also, unless all the provisions are connected in subject-matter, depending on each other, operating together for the same purpose, or otherwise so connected together in meaning that it cannot be presumed the legislature would have passed the one without the other. If when the unconstitutional portion is stricken out, that which remains is complete in itself, and capable of being executed in accordance with the legislative intent, wholly independent of that which was rejected, it must be sustained."

The act in question, as it is left, including its title, is as follows:—

"An act to secure to the owners of live-stock payment of the full value of all animals killed or maimed by railroad trains. Be it enacted, etc.

"Sec. 1. That all railroad companies owning or operating lines of railway within the territory of Washington shall be liable to the owners of all live-stock for the full value of all such live-stock killed or maimed by their passing trains."

"Sec. 8. No railroad company shall be liable for stock killed upon their roads, when the same is fenced by such company with a good and lawful fence."

Construing the act, the court held that its general object was to enlarge and extend the rights of owners of live-stock as against railroad companies, so long as the railways are not

properly fenced, and its final construction of the two sections retained was as follows: "Where an animal, being lawfully upon adjoining land, thence escapes upon a railway track at a place which is not fenced, but which the company may properly and lawfully fence, and the animal is killed by a passing train, the company is liable for the value of the animal if killed; and if injured, but not killed, for the amount of damages caused by the injury. It is evident, upon the face of this statute, that the legislature intended to make the neglect or failure of railway companies to fence their railways evidence of negligence. This is made clear by section 8, which exempts companies from liability for the killing of live-stock, where the railways are properly fenced."

Viewing this act in the light of its title alone, we should be inclined to agree with that court as to the general object sought by the legislature. But that by its terms it was a reasonable statute, or one such as has been commended by courts in the cases cited, or that its provisions could be toned down and softened by the construction put upon them so as to make it a reasonable statute, we are unable to discover, even after a careful study of the decision quoted.

The liability of a railroad company for injuries to live-stock is based upon a supposed negligence in the performance of some duty imposed under the general rules of law or a statute; but to fence its track is not the duty of a railroad company under any law of Washington, either written or unwritten, not excepting the act in question. Therefore, without this statute, the usual rules as to negligence and the burden of proof would apply in these stock-killing cases, and the plaintiff would be answerable for contributory negligence. By this act, however, without imposing upon a railroad company the duty of fencing at any place where a fence would be reasonable, a conclusive presumption of negligence on its part is enacted, and its absolute liability fixed without regard to the possible contributory negligence of the owner. Nor is any distinction made in cases where no lawful fence could be erected, as at street or highway crossings, or in towns; so that were a case presented where the owners of animals hitched to a vehicle, with gross negligence drove them along a highway in front of a passing train, and both owner and animals were injured, while the owner could recover nothing for his own injury, he could have the value of his live-stock from the owner or operator of the train.

Liability of this kind is to be imposed upon him who is found at fault, and the injured party not being himself in the wrong; but here is a statute which imposes a penalty for no fault, which is a taking of property without due process of law, which is forbidden by the constitution. Nor are we able to see in section 8 anything to relieve section 1 of these objections. Under it, railroad companies may fence, or not, as they please; but if they do fence, they may escape every reasonable liability, to the great wrong of owners of stock, through whose herds, accidentally strayed upon their tracks, their engineers may wantonly drive locomotives, killing and maiming helpless beasts, without fear of consequences.

A late and well-considered case upon this subject, growing out of a statute similar to section 1, is that of *Bielenberg* v. *Montana Union R'y Co.*, 8 Mont. 271. In many states there are statutes which make it the duty of railroad companies to fence their tracks at reasonable places; and when animals are killed where there ought to have been a fence, but where none had been erected, the absence of the fence is made conclusive presumption of negligence in some cases, and of liability in others; and these statutes have been upheld. But until the duty of fencing is imposed, no such penalty can be attached to an omission to fence.

Again, it will be noted that in Judge Cooley's rule as to holding part of an act constitutional, although another part be held unconstitutional, it is laid down as requisite that the part upheld must be "capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected." And the court in *Dacres* v. *Oregon R'y & Nav. Co.*, 1 Wash. Ter. 525, held section 1 to meet the requirement. But let us examine. It is true, it would be a very simple thing for courts to enforce the provisions of sections 1 and 8 if they had been enacted alone. But leaving out all question of the right of trial by jury upon which the court in the former case held sections 2 to 7 to be unconstitutional, and suppose there were no such possible objection, what is it that the legislature intended and provided that the owner might recover? and when can the action be commenced? By section 4, notice of the killing must be given to the superintendent, local business manager, or agent of the railroad company by the owner; the notice must be in writing and contain the date and place of the killing, with the number and kind of the animals; and by section 3, ten days were

allowed the company to appoint an appraiser. Both parties were bound by the appraisement, and no suit could be brought until at least ten days after the notice of the killing given in writing to the defendant, through some one of its responsible agents. Presumably, the appraisers chosen would have been more or less experts in valuing stock, and their judgment more satisfactory than the verdict of a jury. Who can say with certainty that the legislature did not intend, in view of the severe rule adopted against the railroad companies as to their liability, that they should, before being put to the cost of a suit, have the time and notice required as substantial rights, and that both parties should have the advantage of expert opinion as to the value directly employed in fixing the amount to be paid, rather than as mere evidence before a jury? These advantages are totally lost with the obnoxious sections out, but we regard them as having been materially within the legislative intent in enacting the law. And further, although section 1 provides that companies shall be liable for "the full value," it seems clear to us that to ascertain for what they are, after all, really liable, section 1 must be read with section 5, where the provision is, that after the appraisement "the amount of such assessment shall thereupon become due and payable, with interest from date of said assessment, at the rate of one per cent per month, and such amount, together with interest and costs, including attorney's fees, now allowed as costs in the district court, may be recovered by suit in any court having jurisdiction thereof." That is, the suit of the owner, instead of being in trespass for the injury to his chattel, would be in *assumpsit* upon the award of the appraisers; the actual value of the chattel would be immaterial, and need not be pleaded or proved; and the very fact of the killing need be pleaded only as a matter of inducement for the award sued on. Was it the intention of the legislature that, instead of the cause of action provided for in section 5, companies should be compelled to respond to, or owners should be required to plead, some entirely different cause of action? or that both should produce their proofs as to value in a different form from that provided in the act? On the contrary, it seems to us that the clear intention of the legislature was to give to both parties all the privileges above mentioned as a substantive part of the right in the one and the liability in the other, and that therefore section 1 is not "capable of being executed in accordance with the apparent

legislative intent, wholly independent of that which was rejected," and must fall with the other unconstitutional sections.

We sustained sections 1 and 8 in the case of *Oregon R'y & Nav. Co.* v. *Dacres*, 1 Wash. 195, decided at this term, but solely upon the ground that the decision of the court in the same case in 1889 constituted the law of the case upon the new trial.

The judgment of the court below is reversed, and a new trial granted.

RAILROAD COMPANIES, DUTY OF, TO ANIMALS UPON THE TRACK. — In the absence of negligence upon the part of a railroad company, it is not liable for stock killed or injured upon the track at a place not required by law to be fenced: Note to *Memphis etc. R. R. Co.* v. *Kerr*, 20 Am. St. Rep. 161, 162; *Railway Co.* v. *Wood*, 47 Ohio St. 431; *Chicago etc. R'y Co.* v. *Hogan*, 27 Neb. 802; *Niemann* v. *Michigan C. R'y Co.*, 80 Mich. 197; *Pennsylvania Co.* v. *Mitchell*, 124 Ind. 473. Nor is the railroad company liable for the killing of an animal driven into a fenced right of way by its owner, and negligently allowed to escape onto the track: *Dolan* v. *Newburgh etc. R. R. Co.*, 120 N. Y. 571. But failing to inclose its track by a fence as required by law, the company must pay damages for trespassing animals killed by it: *Louisville etc. R'y Co.* v. *Powers*, 119 Ind. 169; *Anderson* v. *Stewart*, 76 Wis. 43; *Moser* v. *St. Paul etc. R. R. Co.*, 42 Minn. 480; *Sullivan* v. *Oregon etc. Nav. Co.*, 19 Or. 319; *Van Slyke* v. *Chicago etc. R'y Co.*, 80 Iowa, 621; *Gulf etc. R'y Co.* v. *Hudson*, 77 Tex. 494; *Talbot* v. *Railway Co.*, 82 Mich. 67; *Eaton* v. *Oregon etc. Nav. Co.*, 19 Or. 371.

RAILROAD COMPANIES — STATUTES — NEGLIGENCE. — Statutes are unconstitutional which attempt to declare railroad companies liable for every injury inflicted by their trains, without reference to whether they were negligent or not: *New Orleans etc. R. R. Co.* v. *Bourgeois*, 66 Miss. 2; 14 Am. St. Rep. 534.

HICKMAN *v.* HICKMAN.

[1 WASHINGTON, 267.]

DIVORCE — CHRONIC DEMENTIA AS GROUND FOR. — A statute making chronic mania or dementia, existing for ten years or more, one of the grounds upon which divorces may be granted is constitutional.

DIVORCE — POWER OF LEGISLATURE TO PROVIDE GROUNDS FOR. — The legislature may authorize the granting of divorces by the courts for any causes deemed by it sufficient, though due to the misfortune of the defendant.

Hays and Plumley, for the appellant.

SCOTT, J. Appellant brought this suit in the superior court of Jefferson County to obtain a divorce, upon the ground of in-

curable chronic mania or dementia of the defendant, existing for more than ten years prior to the commencement of the action. The defendant, by her guardian *ad litem*, interposed a general demurrer to the complaint.

The sole question presented to us in the case is as to the validity of the act of the territorial legislature, approved December 22, 1885, making such incurable chronic mania or dementia one of the grounds upon which divorces might be granted, where the affliction had existed for ten years or more. The judge of the superior court before whom the cause was tried held that the act was contrary to public policy, and was therefore unconstitutional. No other objection was urged here, nor is there any apparent defect in the act; however it may be regarded as a measure of public policy, the power of our territorial legislature, under the organic act, extended to all rightful subjects of legislation. The reasons for which divorces might be granted have always been recognized as one of them, under our system of government. In fact, our territorial supreme court held that the legislature could itself grant a divorce by a special act: *Maynard* v. *Valentine*, 2 Wash. Ter. 3; and this was subsequently affirmed by the supreme court of the United States: *Maynard* v. *Hill*, 125 U. S. 190. It follows that the legislature could authorize the granting of divorces by the courts for any causes that the legislature deemed sufficient; and whether the same should be due to misfortune or misbehavior could not affect the validity of such laws.

The judgment of the lower court is reversed.

MARRIAGE AND DIVORCE. — INSANITY AS A GROUND OF DIVORCE: See *Lewis* v. *Lewis*, 44 Minn. 124; 20 Am. St. Rep. 559, and note 561, 562.

MARRIAGE AND DIVORCE. — CONSTITUTIONALITY OF STATUTES GRANTING DIVORCES: See note to *Gaines* v. *Gaines*, 48 Am. Dec. 437–439.

STEWART v. LOHR.

[1 WASHINGTON, 341.]

PROBATE COURT — JURISDICTION TO TRY TITLE. — The probate court is without jurisdiction to try the title to property as between the representative of an estate and the husband of the deceased party claiming adversely thereto.

PROBATE COURT — JURISDICTION — APPEAL. — When the probate court has no jurisdiction of the subject-matter of an action, the higher courts can get no jurisdiction on appeal.

PRACTICE — REVERSAL OF VOID JUDGMENT. — On motion to dismiss an appeal from a judgment, void for want of jurisdiction, the supreme court may order the judgment of the lower court reversed for the purpose of clearing the record.

J. S. STEWART filed his homestead claim upon the land in dispute on January 5, 1880. He was unmarried at that time, and continued to live on and improve the land until he obtained a patent therefor, on October 14, 1887, and thereafter until and after the death of his wife, to whom he was married February 19, 1883. The wife died April 8, 1888, and her executor included the land in dispute in his inventory, filed June 2, 1888, and appraised at five hundred dollars. On April 26, 1889, Stewart moved to strike the land from the inventory on the ground that it was community property. The motion was granted, and on appeal by J. T. Lohr as the son and heir of the deceased, it was decided that the land was community property, but that the improvements made to the date of the marriage were the separate property of Stewart, and that he was entitled to a lien on half of the land assigned to the heirs, to the extent of four hundred dollars. From this decree an appeal was taken.

McBride, Preston, Carr, and Preston, and W. S. Bush, for the appellant.

Ronald and Piles, for the appellee.

HOYT, J. Upon the motion to dismiss the appeal in this cause, it was made to appear to this court that the action was instituted in the probate court, and was there a contest between the executor of an estate and one claiming adversely as to whether or not certain real estate should be included in the inventory of the property of said estate. When this fact appeared, suggestion was made to counsel that the question of the jurisdiction of the probate court to hear and determine such a controversy was the material inquiry which

the court would enter upon in deciding the motion to dismiss; and upon such suggestion, argument was had and authorities cited, and we shall therefore examine the question.

It is conceded that if the probate court had no authority to institute the action, by reason of want of jurisdiction of the subject-matter, then the superior court and this court could get no jurisdiction by way of appeal therefrom. That the probate court is without jurisdiction to try the title to property as between the representatives of an estate and strangers thereto is too well established by the authorities to require argument: See Schouler on Executors and Administrators, sec. 236; *Lynch* v. *Divan*, 66 Wis. 490; *Budd* v. *Hiler*, 27 N. J. L. 43; *Snodgrass* v. *Andrews*, 30 Miss. 472; 64 Am. Dec. 169; *Theller* v. *Such*, 57 Cal. 447.

In the case at bar, the person claiming adversely to the estate was the husband of the deceased party, and it appears that this fact was thought to affect the question. We, however, do not think so. For while it is true that the probate court has jurisdiction to determine the claims to property as between those interested in the estate, this authority only goes to the extent of determining their relative interests as derived from the estate, and not to an interest claimed adversely thereto. In the case before us, the husband, though interested in the estate of his deceased wife, was, so far as the claim he was attempting to assert, an entire stranger thereto: See *Budd* v. *Hiler*, 27 N. J. L. 43, above cited. The probate court had no jurisdiction of the subject-matter of the action, from which it follows that the higher courts could get no jurisdiction on appeal.

It only remains to determine the character of the order to be entered. In the appellate courts of some of the states it is the practice, in cases like this, to simply dismiss the appeal and leave the judgment of the court below to stand in form as a judgment in force. These say that as the judgments are upon their face absolutely void, they will not take jurisdiction even to reverse them. Other appellate courts, however, take the ground that as they have the power to clear their own records of objectionable entries, even though as standing thereon they are absolutely void, they have like power to set aside like void entries in the inferior courts when the form of removing such void entries to such appellate courts has been complied with. We think the latter practice the better one: See *Lynch* v. *Divan*, 66 Wis. 490, above cited. A judgment, unreversed,

though void upon its face, may seriously embarrass the person against whom it is in form rendered, though it can, of course, be of no benefit to the person who has secured it. This being so, such judgment should not be allowed to stand.

The appeal in this case must be dismissed, and the judgments in the superior court and in the probate court reversed; and such probate court must proceed in the administration of the estate in question in accordance with law. The appellant will recover costs of this court, and the appellee the costs in the superior court.

PROBATE COURTS HAVE NO JURISDICTION TO DECIDE UPON THE VALIDITY OF TITLES, but when discharging the duty imposed upon them by statute, they have the power, incidentally, to try titles: *McWillie* v. *Van Vacter*, 36 Miss. 428; 72 Am. Dec. 127.

APPEAL — JURISDICTION. — The court to which an appeal is taken cannot take cognizance of the subject-matter if the court whence the appeal was taken had no power over it: *Moore* v. *Hillebrant*, 14 Tex. 312; 65 Am. Dec. 118, and note.

McCARTY *v.* STATE.

[1 WASHINGTON, 377.]

CONSTITUTIONAL LAW — CRIME COMMITTED PRIOR TO ADMISSION OF STATE — PROSECUTION BY INFORMATION. — A party charged with grand larceny, committed prior to the admission of a state into the Union, is entitled to the United States constitutional guaranty of presentment by indictment by a grand jury, and cannot be prosecuted therefor under an information authorized by the state constitution and statutes.

CRIMINAL LAW — LARCENY — SUFFICIENCY OF INFORMATION. — An indictment or information charging grand larceny, in taking "ninety-three railroad tickets," of an aggregate value, without alleging the value of each ticket taken, or that they were stamped, dated, signed, and genuine, is insufficient, as not stating facts sufficient to constitute the crime.

Town and Likens, for the appellant.

W. H. Snell, prosecuting attorney, Charles Bedford, and C. E. Claypool, for the state.

DUNBAR, J. This is a proceeding by information, on a charge of grand larceny, for the stealing of ninety-three alleged railroad passenger tickets. The information alleged that "the said J. C. McCarty, on the fifteenth day of October, eighteen hundred and eighty-nine (1889), at the county of Pierce, and state of Washington, and within three years prior to the filing of this information, ninety-three railroad passenger tickets, of the aggregate value of one hundred and twenty

dollars, of the chattels and property of the Northern Pacific Railroad Company, a corporation organized and existing under the laws of the state of New York, and doing business in the state of Washington under and by virtue of the laws of said state of Washington, a more particular description of which said railroad passenger tickets is to the said prosecuting attorney unknown, feloniously did steal, take, and carry away, contrary to the form of the statute," etc. To this information the defendant interposed a demurrer, that the information did not state facts sufficient to constitute any offense, and that there was no authority for proceeding by information.

This crime is alleged in the information to have been committed on the fifteenth day of October, 1889. Article 1, section 25, of the constitution of the state of Washington provides for proceedings by information. The act of the legislature authorizing proceedings by information was passed January 29, 1890. The constitution, by act of Congress, as well as by its own terms, did not become operative until the Presidential proclamation, which was not made until November 11, 1889, so that the date of the alleged commission of the crime antedates not only the enactment of the legislature, but also the vivifying of the constitution by the Presidential proclamation. The defendant would have been entitled to the United States constitutional guaranty of presentment by a grand jury on the fifteenth day of October, 1889. Having the right at that time, it could not be taken from him by any retroactive enactment of the state, even had it been the intention of the legislature to make the act retroactive in its operations. When a statute requiring an indictment is repealed, an information will not lie for an offense committed before the repeal: *People v. Tisdale*, 57 Cal. 104; Bishop on Statutory Crimes, 194. As tersely stated by Mr. Bishop: "The rule for the construction of penal statutes is, that they are to reach no further than their words; no person can be made subject to them by implication, and all doubts concerning their interpretation are to preponderate in favor of the accused." The effect of the adoption of the constitution, or admission into the Union of states under that constitution, and the legislative enactment of January 29, 1890, was to repeal the law which guaranteed prosecution for criminal offenses exclusively by indictment. The right to be presented by a grand jury is not a mere change in the proceedings of the court which does not affect the substantial rights of the accused, and to which he cannot object;

it is a constitutional guaranty which rests upon a basis more secure than acts of the legislature, which relate to mere matters of procedure. We do not think the defendant can be held to answer this charge, unless on presentment of a grand jury.

We are also of the opinion that the information failed to state facts sufficient to constitute the crime of larceny. It is not sufficient to charge the taking of "ninety-three railroad tickets," of an aggregate value. Especially is this true when the degree of crime and the degree of punishment is determined by the value of the property stolen. In this instance, if the proof should show that only a portion of the number of tickets alleged to have have been stolen were actually stolen, it would be impossible for the court or jury to determine what degree of larceny the defendant was guilty of. The value of each ticket should have been alleged, and the information should have shown that they were genuine, effective, railroad tickets, as an unstamped, undated, and unsigned railroad ticket is not the subject of larceny: 1 Wharton's Crim. Law, sec. 879; *People* v. *Loomis*, 4 Denio, 380. Without these qualifications, the so-called railroad tickets had no more value than the intrinsic value of the paper on which they are printed, with the cost of preparing them. As this information did not charge the value of the paper, it could not be proven.

It follows that the judgment must be reversed, and the case remanded to the lower court, with instructions to sustain the demurrer. And it is so ordered.

ON PETITION FOR REHEARING.

DUNBAR, J. The petition for rehearing in this case is not allowed; but the court desires to say that in view of the public importance of some of the questions raised, and in view of the fact that the case was submitted without oral argument on the part of the state, that in cases arising hereafter it will not be bound by the opinion rendered in this case on the constitutional questions involved.

LARCENY — INDICTMENT — DESCRIPTION OF STOLEN PROPERTY. — An indictment for larceny must always sufficiently describe the property alleged to have been stolen, so that there may be no doubt of its identity: *Glover* v. *State*, 22 Fla. 493. Where, under the statute, there are several ways by which one may be guilty of larceny, some of which at common law did not constitute larceny, the indictment must so describe the offense as to give defendant information of which way he is charged with having committed the crime: *State* v. *Henn*, 39 Minn. 464. Describing the stolen property by name, kind, quantity, number, and ownership is generally sufficient: *Green* v.

State, 28 Tex. App. 494. An indictment for larceny of a bank note need not charge that it was the note of a particular bank: *Foster* v. *State*, 71 Md. 553. If bills alleged to have been stolen are not properly described in the indictment, a demurrer thereto must be sustained: *Roberts* v. *State*, 83 Ga. 369. Indictments are bad for vagueness and uncertainty in the description of the stolen property: *State* v. *Oakley*, 51 Ark. 112; *Burney* v. *State*, 87 Ala. 80. But an indictment describing the stolen property as "one ten-dollar bill and one five-dollar bill, in money of the United States of America, of the value of fifteen dollars, the personal property of T. P.," is sufficient: *Carden* v. *State*, 89 Ala. 130; but see *State* v. *Oakley*, 51 Ark. 112. So an indictment charging that defendant "did then and there feloniously steal, take, and carry away five dollars in money, then and there being of the value of five dollars, and of the goods and chattels of A B," etc., is sufficient in its description of the stolen property: *Hammond* v. *State*, 121 Ind. 512; but see *Burney* v. *State*, 87 Ala. 80. See note to *Lord* v. *State*, 51 Am. Dec. 232-235.

LARCENY — VALUE OF PROPERTY STOLEN. — If a due-bill has been paid before it was stolen, an indictment cannot be sustained for its larceny, although an indictment may be valid charging the larceny of the piece of paper on which the due-bill was written: *State* v. *Campbell*, 103 N. C. 344.

RITCHIE *v.* GRIFFITHS.

[1 WASHINGTON, 429.]

DEEDS — REGISTRATION AS NOTICE — INDEXING. — A grantee who merely deposits his deed for record in the auditor's office, or other proper office, where it is received by the proper officer, does not thereby convey notice to the public, so that his title cannot be prejudiced through the fault or negligence of the officer in not recording the deed. In order that the deed may constitute constructive notice, it must be duly and properly recorded and indexed, the index being an essential part of the record.

DEEDS — REGISTRATION — RECORDER AGENT OF GRANTEE. — The recorder to whom a grantee gives his deed for the purpose of having it recorded is his agent, and not the agent of a subsequent innocent purchaser. The recorder is responsible to the grantee only in damages for his refusal or neglect to record the deed according to law, and it is the duty of the grantee to see that it is properly recorded, or accept the consequences as between himself and innocent third parties who are misled.

DEEDS — CERTIFICATE OF REGISTRY NOT EVIDENCE OF REGISTRATION. — A certificate that a deed is properly recorded, given by the recorder to the grantee, does not relieve the latter of the responsibility of seeing that the deed is properly recorded, so as to affect the rights of an innocent purchaser, although it may aid the grantee in recovering damages from the recorder.

ACTION by Griffiths and another against Ritchie for the possession of certain land. Plaintiffs claim under the deed of one Smith, which was duly filed and recorded in the proper book of the proper officer, but not indexed in the general index for deeds kept by such officer, and the lower court held

that such registration was notice to subsequent purchasers from Smith, and rendered judgment for the plaintiffs, and the defendant appeals.

Bush and Noyes, for the appellant.

Johnson and Moody, for the appellees.

DUNBAR, J. The first question to be decided in the consideration of this case is, Does a grantee who deposits his deed for record in the auditor's office, where it is received by that officer, discharge his duty of notice to the public, so that his title cannot be prejudiced through the fault or negligence of the auditor in not recording said deed in accordance with the requirements of the registry laws? If it is concluded that he does so discharge his duty, and that constructive notice is thus given, it will be conclusive of this case, and it will not be necessary to enter into the question of whether or not the index is an essential part of the record. It will be seen that important questions arise here affecting valuable rights, and that whichever way they are decided, a hardship will be imposed upon an innocent party. In one instance, the first grantee relies on the officer, who is a creature of the law, to do his duty; and in the other, the purchaser, reposing faith and confidence in the correctness of the record, acts upon it. Shall the deed prevail, or the record of it? On the first question, there is a somewhat perplexing conflict of authority; some courts holding that a deed is recorded, in contemplation of law, when it is entitled to registration and is deposited with the recorder in his office for that purpose, and if, through any fraud or neglect or mistake of the recording officer, the proper notice is not conveyed to a subsequent purchaser or encumbrancer, that the misfortune will fall upon the subsequent purchaser; while other courts hold the opposite doctrine, that the *onus* is on the grantee who deposits his deed with the recorder to see that every step is taken and every act done that is prescribed by the registry laws. For collated authorities on this question, see *Mangold* v. *Barlow*, 61 Miss. 593, 48 Am. Rep. 84, and Wade on Notice, 70–73. In many of the cases, however, that are cited as holding the doctrine claimed by plaintiff, the courts, on a careful investigation, are found to have based their opinions on statutes materially different from ours, and others on the peculiar circumstances of the case.

The enunciation by the supreme court of the United States,

in *Lytle* v. *Arkansas*, 9 How. 314, that "it is a well-established fact that where an individual in the prosecution of a right does everything which the law requires him to do, and he fails to obtain his right, by the misconduct or neglect of a public officer, the law will protect him," has been largely relied upon by the plaintiff, and has been quoted by a majority of the cases reported that hold the plaintiff's view; but in none of these cases, that we have seen, have the circumstances of that case, which called forth the opinion, been reported. To get the full scope and meaning of this expression, we must not regard it as a segregated proposition, independent of the case under consideration, and applicable to all cases; for judges, in rendering opinions, use expressions with reference to the application of principles involved in the case under consideration, and the language employed must be construed, and its meaning gathered, from an examination of the questions involved, the circumstances surrounding, and the argument that leads up to the utterance; or in homely phrase, it is necessary to know what the court was talking about. Of course, there are certain underlying or basic principles of law from the true deductions of which are constructed legal maxims which may be stated as independent propositions, and which will admit of no modification; but the examination of the case cited shows that the quoted utterance of the eminent judge has no application to the principles involved in and the circumstances surrounding this case. That was a case where a pre-emption claimant tried through a succession of years to obtain title to some fractional subdivisions of land, and was prevented, not by any negligence of the register and receiver in the land-office, but on account of their construction of the law and circular instructions from the general land-office. Afterwards, by act of Congress granting a thousand acres of land to the state of Arkansas for the purpose of building a court-house, the governor selected and sold the land in controversy to one Russell, under whom the defendants held. Of course many interesting questions were raised during the trial of this case, but the particular circumstances of the case which called out the quoted utterance, and the intended application of the principles therein enunciated, can probably be gathered from the balance of the paragraph following the quotation, which is as follows: "In this case, the pre-emptive right of Cloyes having been proved, and an offer to pay the money for the land claimed by him, under the act of 1830,

nothing more could be done by him, and nothing more could be required of him, under that act. And subsequently, when he paid the money to the receiver, under subsequent acts, the surveys being returned, he could do nothing more than offer to enter the fractions, which the register would not permit him to do." Thus it will be seen that none of the principles involved in the case at bar were involved in that case; and it shows the misleading tendency of quoting detached sentences from the opinions of courts. In that case, the action of Cloyes was at every step a matter of public record and of official report, and the whole circumstances of the case show that the defendants had actual notice of his claim, though some of them denied such a notice in the answer, while others admitted that they had heard of his claim, but believed it to be fraudulent; but the court spoke with reference to the acts of an officer acting in a judicial capacity, and deciding questions of law,—decisions and acts over which the plaintiff could not possibly exercise any supervision or control. It will certainly not be hard to see that a very different rule might obtain when the act required by the applicant was purely ministerial, and which he had a right to see was done in the manner prescribed by law. It is doubtful if the judge who rendered that opinion would have concluded that the grantee had done everything which the law required him to do, when he contented himself with simply handing his deed to the auditor without exhibiting any further concern about it. In our judgment, the scope and meaning of this opinion has been entirely misconstrued when applied to this character of cases. In *Mangold* v. *Barlow*, 61 Miss. 593, 48 Am. Rep. 84, one of the best-argued cases sustaining the doctrine that the *onus* is on the purchaser, and a case which is also largely quoted, the court bases its opinion on the peculiar language of the Mississippi statute, which declares that certain instruments "shall be void as to all creditors and subsequent purchasers for valuable consideration without notice, unless they shall be acknowledged or proved, and lodged with the clerk of the chancery court of the proper county to be recorded." Here the statute seems by express terms to make the lodging of the properly proved instrument with the clerk the proof of constructive notice.

And thus it is with a great majority of cases cited in favor of plaintiff's theory. A close examination of them will show that the opinion is based upon some express language of the

statute which would justify the conclusion reached; but on the general proposition, however, the decided weight of authority seems to be in favor of the view that the record can be relied upon by subsequent purchasers without actual notice, and that constructive notice cannot be given by an attempt to comply with the registry laws. And this view, we think, is supported by right reasoning, and founded on principles of equity and justice. As is most admirably stated by Mr. Jones in his work on mortgages: "Registry laws are intended to furnish the best and most easily accessible evidence of the title to real estate, to the end that those designing to purchase may be fully informed of instruments of prior date affecting the subject of their contemplated purchase, and also that, having availed themselves of this means of knowledge, they may rest there, and purchase in absolute security, provided they do so without knowledge, information, or such suggestion from other facts, as would be gross negligence to ignore, of some antecedent conveyance or equitable claim."

The recorder cannot be considered the agent of the purchaser, as is asserted by some of the authorities. It is a much fairer construction of the law, and more in harmony with the law of agency generally, to consider him the agent of the party who has the business transaction with him; who gets him to do the work; and to him he should be responsible for any damage flowing from his refusal or neglect to do the work according to the contract between them; and that contract is either express or implied that the instrument shall be recorded according to law. That is what the grantee pays him to do, and he must see to it that his work is done right, or accept the consequences as between himself and third parties who are misled. It cannot be said that the purchaser is alone subject to damages from the non-recording of the instrument; the very object in having it recorded is to give constructive notice to innocent purchasers, and to protect the grantee's title against said purchasers. The law imposes upon him the duty of having his deed recorded. It is not the attempt to record a deed that the law requires, but it is the recording of the deed. It would be an empty benefit, indeed, that would accrue to the buying public if the attempt to record were held to take the place of the record. The obligation rests upon the grantee to give the notice required by the law. He controls the deed; he can put it on record or not, as he pleases. He has the right and the opportunity to see that the work is

done as he directs it to be done, — in legal manner. No one else has this opportunity, and if from any cause he fails to give the notice required by law, the consequences must fall on him. It may be a hardship, but where one of two innocent persons must suffer, the rule is, that the misfortune must rest on the person in whose business and under whose control it happened, and who had it in his power to avert it. Any other rule would be abhorrent to our natural ideas of right, and would render perilous every business enterprise.

The fact that the recorder gives to the grantee a certificate that the deed is properly recorded does not relieve him of the responsibility of seeing that it is actually so recorded. The certificate binds no one but the recorder, and cannot possibly, under any known rule of law or ethics, affect the rights of an innocent purchaser, who cannot be bound by a transaction to which he is in no sense a party, of which he has no knowledge, and for which he is in no way responsible. As we before intimated, it might aid the grantee in recovering damages from the auditor, but could do no more than that.

The record is the essence of the law; the recorder is only a convenient instrument for the use of those whose duty it is to make the record. If, under the law, a public record were kept where every grantee was required to come and record his deed, he could certainly not plead his own mistakes or negligence; and the only reason why every man is not allowed to record his own instruments is, simply, that the record may be kept in a legible, orderly and presentable manner; and the law provides one man to do the work for the many, or in other words, makes the one man the agent of the many, and who does the work at their instance, and under their pay and control. It is true that in another department of his work he may be said to be the agent of the purchaser, or searcher of the records, for the law also makes him the custodian of the record-books. Every man has a right to see the records, and the law, for the purpose of preserving the records and assisting the searcher of the records, constitutes the recorder their keeper, who, at certain hours found by the law to be reasonable, must exhibit them to all who wish to see them, and must also certify to what the record shows, when requested so to do and paid for said services; and if in the exercise of either of these duties he either in misrepresenting the books by exhibiting false or blind records, or in making a false certificate, whether through fraud or negligence, the person for

whom the service was rendered must suffer the damage, if any flow from the negligent or fraudulent act, and his only remedy is against the recorder, for damages. A employed the recorder to search the records, and the recorder certified to A that the record title to a certain tract of land stopped with and rested in B; upon the strength of which A purchased of B, for a valuable consideration, said land, and it afterwards eventuated that C had a good deed on record for the same land, which the recorder overlooked. No well-regulated court would, we think, hold that the title of C would be jeopardized by the mistaken certificate of the recorder. We cannot conceive how the inconsistency or injustice would be diminished by holding that the innocent purchaser did not have a right to rely on the true record, or that the grantee would be protected by the false or mistaken certificate of the recorder.

With this view of the case, it becomes necessary to investigate the next question involved; viz., Is the index an essential part of the record, under the registration laws of this state? On this proposition, also, there is conflict of authority, though the conflict in many cases is more seeming than real, for, as with the first question discussed, a great many of the decisions which are cited as in point on the abstract principle prove, upon close investigation, to have been decided upon statutory provisions differing materially from ours. And as constructive notice by means of recorded instruments depends wholly upon statutory provisions, we will first examine the statute in force at that time. The statutes in force at the time of the alleged constructive notice will be found in the Session Laws of 1869, on pages 313, 314, and 315, and the sections to be construed in this case are as follows:—

"Sec. 18. The auditor of each county in this territory shall record, in a fair and legible handwriting, in books to be by him provided for that purpose at the expense of the county, all deeds, mortgages, and other instruments of writing required by law to be recorded, and which shall be presented to him for that purpose, and the same shall be recorded in regular succession, according to the priority of their presentation; and if a mortgage, the precise time of the day in which the same was presented shall also be recorded.

"Sec. 19. Upon the presentation of any deed or other instrument of writing for record, the auditor shall indorse thereon the date of its presentation, ... and when such deed or other instrument of writing shall be recorded, the re-

corder shall indorse thereon the time when recorded, and the number or letter, and page or pages, of the book in which the same is recorded."

Section 20 prescribes the penalty for failing to record when fees are tendered.

Section 21 provides for keeping a seal and making copies of records.

Section 22 directs the turning over the records to successor in office.

"Sec. 23. Each auditor shall, upon the written demand of any person, make out a statement in writing, certified under his hand and the seal of his office, of all mortgages, liens, and encumbrances of any kind of record in his office, upon any real or personal property in relation to which the demand shall be made; and if said statement shall be incorrect, he and the sureties upon his official bond shall be liable to the person aggrieved for all damages sustained by him in consequence of such incorrect statement, to be recovered in a civil action.

"Sec. 24. Each county auditor shall keep a general index, direct and inverted. The index direct shall be divided into seven columns, with heads to the respective columns as follows:—

Time of reception.	Grantor.	Grantee.	Nature of instrument.	Volume and page where recorded.	Remarks.	Description of property.

"He shall correctly enter in such index every instrument concerning or affecting real estate, the names of the grantors being in alphabetical order. The inverted index shall be divided into seven colums, precisely similar, only that the names of the grantees shall be alphabetically arranged, and occupy the second column.

"Sec. 25. Whenever any mortgage, bond, lien, or instrument encumbering real estate has been satisfied, released, or discharged from record, whether by written release across the record, or upon the margin thereof, or by the recording of an instrument of release, or acknowledgment of satisfaction, the auditor shall immediately note in both the indices, in the column headed 'Remarks,' opposite to the appropriate entry, that such instrument, lien, or encumbrance has been satisfied."

These different sections were not only all passed at the same session of the legislature, but are all incorporated in one act,

and must therefore be construed together; and construing them as a whole, we conclude that sections 18, 19, and 24 intended to provide a system for the registration of deeds and other instruments affecting real estate, the compliance with which would be constructive notice to strangers. The act points out several successive steps to be taken by the auditor when the instrument comes into his possession, before his duty with reference to it is accomplished: 1. He must file it for record, noting the time when it was presented for record; 2. Record it in a fair, legible hand, in a book provided by the county for that purpose; 3. Correctly enter it into an index-book, provided for that purpose, showing the time of reception, name of the grantor and grantee, nature of the instrument, volume and page where recorded, and description of the property. And all three of these successive steps must be taken before the record is complete. The other sections which we have quoted are simply directory to the auditor, or affect simply the auditor and the person with whom he is dealing; but the three requirements specified above are for the direct and only purpose of giving notice to the public. They are vital provisions, essential to constitute constructive notice.

The appellees' counsel cite section 4 of the act of November 9, 1877 (Laws 1877, p. 312), which is as folllows: "All deeds and mortgages shall be recorded in the office of the county auditor of the county where the land is situated, and shall be valid, as against *bona fide* purchasers, from the date of their filing or recording in said office, and when so filed or recorded shall be notice to all the world"; and argue from that, that legal notice is given simply by filing the deed with the county auditor, and that no other notice is necessary. If that view could be entertained, it would practically render the provision in regard to recording a nullity; for the notice would be complete when the instrument was filed, and no man would go to the unnecessary expense of recording, and the record would soon become a voluminous and unapproachable mass of loose papers. There was evidently no such contemplation by the statutes. The auditor has twenty days within which to record the deed after it is filed; and it is the evident meaning of the law that it would be notice, by virtue of the filing, only during the *interim* of twenty days, at the expiration of which time it is presumed to be recorded, and the deed can be withdrawn when the record becomes the notice. Or as is more elegantly stated by Judge Dillon in *Barney* v. *McCarty*, 15 Iowa, 510,

83 Am. Dec. 427, in construing a similar statute: "As the filing is but one step in a series of steps, this language presupposes, and is in fact based upon, the assumption that the other, and in the order of time, the subsequent, requirements of the law will be observed." The Iowa statute was substantially as ours, except that the recorder was required to keep a "fair-book," in which he entered every deed, giving date, parties, and description of land, in addition to an index with about the same requirements as ours. So that there was really more chance for an innocent purchaser to be put on his guard, under their registration laws, in the absence of the index, than under ours. And yet the supreme court of that state has uniformly held that the index was necessary to give constructive notice.

We are strengthened in our opinion that the index is an essential part of the record, necessary to give notice, by the provisions of section 25, which require that the satisfaction of instruments affecting real estate shall be noted in the index. The legislature, recognizing the importance of the index, and the universal custom of depending upon the index in searching the record, required that every step taken, both as to conveying, encumbering, and releasing real estate, should be made to appear briefly on the index.

It is asserted by plaintiffs "that the general construction placed upon statutes similar to ours is, that the index constitutes no part of the record, and that a grantee cannot suffer from any error or omission in it"; and in defense of this proposition cites *Musgrove* v. *Bonser*, 5 Or. 313; 20 Am. Rep. 737; *Bishop* v. *Schneider*, 46 Mo. 472; 2 Am. Rep. 533; *Chatham* v. *Bradford*, 50 Ga. 327; 15 Am. Rep. 692; *Curtis* v. *Lyman*, 24 Vt. 338; 58 Am. Dec. 174; and 1 Devlin on Deeds, secs. 695–697.

In the first case cited (*Musgrove* v. *Bonser*, 5 Or. 313; 20 Am. Rep. 737), the court decided,—1. That a deed which had been acknowledged in Washington Territory by an officer, other than a commissioner of deeds for Oregan, where the deed did not have the certificate of a certifying officer of a court of record under seal that the acknowledging officer was such officer as he represented himself to be at the time of said acknowledgment, was not entitled to record under the statute, and therefore did not give notice; 2. That the recording acts of Oregon only protect persons who act in good faith; and 3. Cited a case of *Hastings* v. *Cutler*, 24 N. H. 481, holding that

where a defective deed has been recorded, while it did not operate as constructive notice of the conveyance, it might operate as actual notice, and the court, in the case above cited, said: "But if by means of that registration of the defective deed, the defendants had actual notice of the plaintiff's title, they are charged with the notice as in other cases. The defendants, when they found the copy of the plaintiff's deed on record, must have understood that the intended record was to give information that such a deed had been made, and that plaintiff claimed the land under it. This must be regarded as actual notice, such as every reasonable and honest man would feel bound to act upon." There is no suggestion of an index in the case; but it is plain that on the other proposition, which we have already considered, the plaintiffs' case does not fall within the reason upon which this conclusion is based. In that case, it might be urged, with some degree of justice, that there was enough revealed by the record to put the purchaser on his guard, and once being notified of the conveyance, it would be his duty to investigate; and if from such investigation the will of the grantor could be gathered, he would not be an innocent purchaser, if he purchased contrary to such revealed will. But in the case at bar, the very instrument by which this notice is given is wanting, and the avenues of knowledge are closed up. In *Bishop* v. *Schneider*, 46 Mo. 472, 2 Am. Rep. 533, the court holds that the index is no part of the record, asserting that the proper office of the index is what its name imports, — to point out the record; that "the grantee has no control over the official acts of the recorder, and when he delivers his deed to the officer, he has performed all the duty within his power." But the court states that this decision is based alone on the construction of the statutes of that state, and they are materially different from ours, both with regard to the definiteness of the index concerning deeds, and the absence of the requirements to note the satisfaction of mortgages and other instruments affecting real estate in the index. Altogether, their statute does not make the index so important a part of the system of registration as ours does. Their statute also provides that when an instrument is filed with the recorder, it shall be considered as recorded from the time it is delivered. The opinion in this case quotes approvingly the case of *Sawyer* v. *Adams*, 8 Vt. 172, 30 Am. Dec. 459. There the town clerk copied a deed delivered to him for record, on a book which had ceased to be a book for recording for a

number of years; and for the purpose of concealment and fraud, did not insert the names in the index or alphabet. It was held that the deed was not recorded, and was not notice to after-purchasers. This is indorsed by the Missouri case, on account of the fraud that was perpetrated. But it seems to us that it makes little difference, so far as the equities of the innocent purchasers are concerned, whether the obscurity of the record was the result of fraud or negligence on the part of the recorder. Certainly, there is no logical basis for such a discrimination. The rights of the purchaser must depend upon something more tangible and more easily ascertained than the motive of the officer. Evidently the idea upon which the decision in this case was based was, that the searcher of title had been misled by the state of the record. But as a practical fact, he would have been no more liable to have been misled by reason of the deed being recorded in an unused book, than if it had been recorded in the proper book and not indexed. The recording in the unused book was an unnecessary act of caution on the part of the recorder in his attempt to deceive. In *Chatham* v. *Bradford*, 50 Ga. 327, 15 Am. Rep. 692, while the court to a certain extent argues the general proposition, insisting that an index is only a means of access to the record, and that ease of access is wholly a question of degree, it says that many of the records of that state have no index; that their acts for the recording of deeds do not, any of them, require the clerk to keep an index; and states, in conclusion, that they put their decision mainly on their own statutes, and on the condition of the records and the uniform practice of that state. They also approvingly cite *Sawyer* v. *Adams*, 8 Vt. 172; 30 Am. Dec. 459. *Curtis* v. *Lyman*, 24 Vt. 338, 58 Am. Dec. 174, cited by plaintiffs on this point, we have been unable to obtain; but from reference to it in other cases, we conclude that their statute is different from ours in reference to indexing. Considering the difference in the statutes, we think that none of the cases cited are directly in point.

While it is true that Devlin, in his work on deeds, section 696, seems to imply that an index is not necessary to give constructive notice, yet he evidently bases the idea, not so much on the theory that the index is not a part of the record, as from his general conclusion that the obligation of the grantee as to notice ceases when he has filed his deed for record. And he qualifies this general statement by saying, "Unless the language of the statute necessarily leads to a different con-

clusion,"—a qualification, it seems to us, which renders meaningless the general statement; for as constructive notice is purely statutory, it must necessarily follow that it is the "language of the statute" that leads to one or the other of the conclusions. He cites *Barney* v. *Little*, 15 Iowa, 527, but says that "the decision in that case was founded upon the express language of the statute of that state," intimating that in consideration of the statute the conclusion of the court was correct; and inasmuch as our statutes make the index a more important factor in the system of registration then does the Iowa statute, we may fairly conclude that under a statute like ours this learned author would consider the index an essential part of the record. Indeed, upon painstaking investigation, not only of all the cases cited by plaintiffs (except the Vermont case, above referred to), but of many others, we have been unable to find a case reported which decides that an index is not an essential part of the record, upon a statute substantially like the registry laws of 1869. It is true that in numerous cases it has been decided that where an instrument affecting realty was not indexed as required by law, that the title of the grantee should not be disturbed. The greater part of such decisions, however, will be found, on examination, not to be based on the theory that the index is not a part of the record, but upon the broad principle that the recording officer is the agent of the subsequent purchaser, and that the grantee is acquitted when he places his deed for record in the hands of the proper officer,—a position which, we think, is untenable for the reasons above given. It is urged by the court in *Schell* v. *Stein*, 76 Pa. St. 398, 18 Am. Rep. 416, in deciding the case adversely to the interest of the purchaser, that the provision for indexing the records is of comparatively modern origin, and that such provisions did not exist in the early registry laws. This, we think, is a good argument, but the application by the learned judge was, in our judgment, bad. The law was no doubt suggested by the necessity of some such provisions, as the records accumulated; and at the present day, considering the accumulations of deeds, mortgages, and liens of all kinds affecting real estate, and the rapidity with which titles are changing every day, if we give the effect of constructive notice to the record at all, the only practical way by which the public can obtain the benefit of that notice is through the medium of the index. Laws are enacted for the benefit of the citizen, not only in theory, but

in practice. They are not intended as pitfalls for the feet of the unwary. The state provides, in express terms, for the keeping of this index, and its mandate to the auditor is to enter in said index, in alphabetical order, the names of the grantors and grantees. This law the citizen is aware of; he has a right to presume that the law has been obeyed. If there was no such law, and he had abundance of time and untold patience, he might devote himself to the task of examining the vast accumulations of records, page by page; but with the law in effect, and the universal custom recognized of examining the record through the index, if the instrument is not indexed, the law, instead of aiding and protecting the citizen, becomes a delusion and a snare, and a ready vehicle for collusion and fraud. It would be a policy worthy of the consideration of the ancient tyrant who wrote his laws in small characters and posted them so high that his subjects could not read them, while at the same time he held them accountable for their strict observance. In this connection we cannot refrain from quoting the language of the court in *Barney* v. *McCarty*, 15 Iowa, 510, 83 Am. Dec. 427, "that a deed might as well be buried in the earth as in a mass of records without a clew to its whereabouts." In *Speer* v. *Evans*, 47 Pa. St. 141, the court says: "As a guide to inquirers, the index is an indispensable part of the recording, and without it, the record affects no party with notice." This, we think, is the better view of the law.

In this case there is no question of actual notice, and applying the law as we have found it to be to the case at bar, it follows that the judgment of the lower court must be reversed. The case is remanded to the lower court, with instructions to reverse the judgment.

REGISTRATION OF INSTRUMENTS — NOTICE IMPARTED. — The question as to when constructive notice is given by the filing, recording, and indexing of a conveyance is fully discussed in a note to *Green* v. *Garrington*, 91 Am. Dec. 106–110, in which are collected the authorities both for and against the rule as laid down in the principal case. See also *Marlet* v. *Hinman*, 77 Wis. 136; 20 Am. St. Rep. 102. In *Belbane* v. *Ratto*, 69 Tex. 636, *Bassett* v. *Brewer*, 74 Tex. 554, note to *Beebe* v. *Morrell*, 15 Am. St. Rep. 295, 296, the rule seems to be followed which considers an instrument as duly recorded so as to impart constructive notice when it is deposited with the proper officer for record.

RECORD OF CONVEYANCES. — NECESSITY FOR AN INDEX: See note to *Green* v. *Garrington*, 91 Am. Dec. 109, 110; note to *Hibbard* v. *Zenor*, 9 Am. St. Rep. 503, 504. In some states the index constitutes an essential part of the proper registration of an instrument: *St. Croix etc. Co.* v. *Ritchie*, 73 Wis. 409; *Prim-*

gle v. *Dunn*, 37 Wis. 449; 19 Am. Rep. 772. And in Michigan, entry in the entry-book must be made before a conveyance can be deemed recorded: *Baker* v. *Mercier*, 75 Mich. 42. The remedy for failure to record, or for making a defective record, is against the recorder: *Green* v. *Garrington*, 16 Ohio St. 548; 91 Am. Dec. 103.

REGISTRATION OF INSTRUMENTS — PROOF OF. — The recorder's certificate that a conveyance is properly registered is not conclusive: *Johnson* v. *Burden*, 40 Vt. 567; 94 Am. Dec. 436, and note.

ILWACO RAILWAY AND NAVIGATION CO. *v.* HEDRICK.

[1 WASHINGTON, 446.]

NEGLIGENCE — INJURY TO CHILD — UNLOCKED TURN-TABLE — MEASURE OF DAMAGES. — In an action against a railway company for negligently causing the death of a child in leaving a turn-table unfastened, the measure of damage is the loss occasioned by the death; and his health, mental and physical condition, and expectancy of life are proper subjects to be submitted to the jury for their consideration in estimating the damage sustained.

NEGLIGENCE — INJURY TO CHILD FROM UNLOCKED TURN-TABLE — EVIDENCE. — In an action against a railway company for negligently causing the death of a child in leaving its turn-table unfastened, expert medical testimony that the child was frail and weak, and that he died from the injury received at the turn-table, is admissible on the issue as to his health and physical condition at the time of the injury; but such testimony as to "whether or not, if the child had been a healthy child, it would have survived the injury" is inadmissible under such issue.

NEGLIGENCE — INJURY TO CHILD — EVIDENCE OF CUSTOM IN REGARD TO TURN-TABLES. — In an action against a railway company for negligently causing the death of a child in leaving a turn-table unlocked, evidence of a custom of railways to leave their turn-tables unlocked and unfastened at all times, whether in actual use or not, no matter whether inclosed or in a public place, is inadmissible on the issue as to whether or not the turn-table was secured, at the time of the injury, as careful and prudent men would ordinarily fasten it under similar circumstances.

NEGLIGENCE — UNFASTENED TURN-TABLE — INJURY TO CHILD. — It is the duty of a railway company to so fasten its turn-table as to prevent injury to those who, by reason of their tender years, are incapable of comprehending its dangerous character, either by locking it, or in some other way preventing access to it. A failure to take such precaution is negligence on the part of the company, for which it must respond in damages. In such case, the fact that prior to an accident the turn-table had been secured by a rope, which might be untied by children playing upon it, and in the past had proved to be an insecure fastening, will not exonerate the company from liability.

NEGLIGENCE AS TO UNFASTENED TURN-TABLE — QUESTION FOR JURY. — Whether or not a railway company is guilty of negligence in leaving its turn-table unfastened, thereby injuring a child of tender years, is a question for the jury to determine under all the facts and circumstances of each particular case.

Fulton Brothers, for the appellant.

Watson, Hume, and Watson, for the appellee.

ANDERS, C. J. This was an action by appellee, as administrator, to recover damages for the death of his son, a child between five and six years of age, alleged to have been caused by the negligence of appellant in not properly securing a turn-table situated upon its own premises, in an open area, near one of the principal streets and close to the business portion of the town of Ilwaco, in this state. It appears that the turn-table had been constructed but a short time previous to the accident to the child, and that up to that time it had not been used by appellant for the purpose for which it was designed. A considerable number of the children of the town had been in the habit of playing upon and revolving it previous to the accident to deceased. It was tied to a stake the day before, with a piece of rope by one Hoffman, not in the employ of the railroad company, but was soon after untied by one of the children, and play resumed upon it. The managing agent of appellant, whose office and place of business was in close proximity to the turn-table, testified, in substance, that he also tied it, or caused it to be tied, with a rope two days before the boy was injured; that the next day he noticed it was unfastened, and tied it with the same rope and in the same place; that it remained tied all that day; that he saw the children again on the table the evening before the accident; that they had untied it, and were revolving it and riding on it; that he drove them away and told the men working on the track to keep them away from the turn-table; and that he tied it four times in all with the same piece of rope. But that the table was ever tied or fastened at all, except by Hoffman, is disputed by other testimony in the case. The deceased child had never been to this turn-table before the time he was injured, but on that day he was sent by his mother on an errand to the store, about three hundred yards distant from his home, and close to the turn-table. Returning from the store, he was attracted by the children at play upon the turn-table, and stopped and sat down to watch them on the abutment, on or near the rails of the track connecting with the turn-table, in such a manner that his feet hung down on the side next to the turn-table. While in that position the children turned the table so that his legs were caught between it and the abutment, and so injured that the flesh of both legs, from his knees down, was

mangled and torn from the bones, from the effects of which he died three days afterwards. Upon the trial in the court below, the jury returned a verdict in favor of the plaintiff for the sum of two thousand dollars. Judgment was entered upon the verdict, from which defendant appeals, and assigns the rulings of the court below in excluding certain testimony offered by defendant, and the refusal of the court to charge the jury as requested by it, as error.

To prove the character of the injury, and that the death of deceased was caused thereby, the plaintiff called as a witness a physician and surgeon, who, having stated, among other things, that he attended the child from the time of the accident until his death, and that he died from the injuries received at the turn-table, further testified, but whether on direct or cross examination is not clear, that the child was a frail, weak child. On cross-examination, counsel for defendant asked the witness this question: "State whether or not, in your judgment, if the child had been a healthy child it would have survived the injury." This question was objected to by counsel for plaintiff, on the ground that it was irrelevant and immaterial, and the objection was sustained by the court, and this ruling, appellant contends, was erroneous and prejudicial. It is claimed that the evidence sought to be elicited by the question was material in aiding the jury in arriving at plaintiff's damage. And in support of the proposition it is argued that a child so weak or feeble that he could not survive an injury that a healthy child would have survived has a less expectancy of life than the ordinary child, and could not be expected to accumulate so much for his estate, and that an estate would be less damaged by the death of a weak child than by that of a healthy one.

It is true that the measure of plaintiff's damage is the loss occasioned by death of the deceased, and that his health, mental and physical condition, and his expectancy of life were proper subjects to be submitted to the jury for their consideration in estimating the amount of the damage sustained by the estate. But it does not follow that defendant should have been permitted to show that, in the opinion of the witness, deceased would not have died from the effects of the frightful injury he received if he had been as strong and healthy as some other boy, or even if he himself had been more vigorous. There was no controversy as to the cause of the child's death; and the question then before the jury was,

not what amount of injury of the character suffered by him he could or would have survived under other circumstances, but what was in fact his health and physical condition at the time of the injury; and that the witness had already stated. We see no error of the court in excluding the question.

It is next contended that the court erred in excluding the testimony offered by appellant to show that it is not the custom of railroad companies, or those operating such turn-tables, to have or keep the same locked or fastened at any time, but on the contrary, that the custom and practice of all such companies is, and always has been, to have and keep them unfastened and unlocked at all times, whether in actual use or not, and whether inclosed or in an open public place. We think this evidence was clearly immaterial, and was rightly excluded by the court. The question at issue was whether the defendant secured the turn-table as careful and prudent men would ordinarily do under like circumstances. What would be clearly negligent in one case and under some circumstances might be ordinary care under other and different circumstances; and whether there is negligence in any particular case must generally be determined by the facts and circumstances of that case, and not by any general custom or practice: *Koester* v. *Ottumwa*, 34 Iowa, 41; *Koons* v. *St. Louis etc. R. R. Co.*, 65 Mo. 592; see also Deering on Negligence, sec. 9, and cases cited. Besides, the custom proposed to be shown is manifestly unreasonable and negligent, and was not relied upon by appellant as a defense in the cause; for it claimed, and still claims, immunity from liability on the ground that it secured its turn-table properly.

The next assignment of error is the refusal of the court to give, without modification, the following instructions, asked by defendant: —

"1. If you shall find that the turn-table was tied on the day of the accident and injury complained of, in such manner as to prevent its being revolved without untying or cutting the rope by which it was tied, and that on that day, without the knowledge or consent of the defendant, the rope was cut or untied by a persons or persons not in the defendant's employ, and that the accident producing the death of the child, Franklin G. Hedrick, occurred before the fact that the rope had been cut or unfastened became known to the defendant or its officers, then I charge you that the defendant is not liable in this action.

"2. If the defendant so fastened the turn-table that it could not be revolved so as to injure a person or a child, and in the absence of the officers of defendant, some person wrongfully cut or untied the fastenings so that the turn-table could be revolved, and thereby the deceased received the injury that caused his death, I charge you that the defendant is not liable, and your verdict should be in favor of defendant."

The court modified the first of these instructions by adding thereto, "unless there was want of ordinary care in the method or manner in which the company undertook to secure the turn-table, and you believe that this method was the proximate and controlling cause of the injury"; and the second, by adding the words, "if you do not further find that the accident or injury was the result of want of ordinary care in the manner in which the company undertook to secure the turn-table, and that such want of ordinary care was the proximate and controlling cause of the injury." As so modified, the court gave both instructions. Whether this action of the court was erroneous or not must depend upon the measure of duty which appellant owed to the deceased under the circumstances. It had erected this alluring and dangerous machine in an open, public place, and its agent and manager not only knew that young children were instinctively attracted by it, and were in the habit of playing upon and around it, but that the method adopted, if any, to prevent them from so doing was wholly insufficient. It certainly would not have been a matter of very great inconvenience to have securely fastened or locked this unused turn-table before the deceased was injured, as was done immediately afterwards. And we think it was the duty of appellant to so secure it as to prevent injury to those who, by reason of their tender years, were incapable of comprehending its dangerous character, either by locking it, or in some other way preventing access to it; and a failure to take such precaution was negligence on the part of appellant: *Gulf, Colorado, and Santa Fé R'y Co.* v. *Styron*, 66 Tex. 421; *Pittsburg, Allegheny, and Manchester Pass. R'y Co.* v. *Caldwell*, 74 Pa. St. 421; *Nagel* v. *Missouri Pacific R'y Co.*, 75 Mo. 653; 42 Am. Rep. 418; *East Saginaw City R'y Co.* v. *Bohn*, 27 Mich. 503; *Hydraulic Works Co.* v. *Orr*, 83 Pa. St. 332; 2 Rorer on Railroads, 1121, 1122. The instruction asked by appellant, in effect, requested the court to charge the jury, as matter of law, that if they found that appellant took the precautions and used the means claimed by it to secure the turn-

table, it would not be liable in this action. And we are of the opinion that the court committed no error in refusing to give the instruction as requested. The question whether or not appellant, under all the facts and circumstances of the case, was guilty of negligence was for the jury, and was fairly submitted by the instructions given by the court: *Sioux City etc. R. R. Co.* v. *Stout*, 17 Wall. 657; *Hoye* v. *Chicago etc. R'y Co.*, 62 Wis. 666; *Hydraulic Works Co.* v. *Orr*, 83 Pa. St. 332.

There appearing no error in the record, the judgment of the court below must be affirmed.

RAILROAD COMPANIES — NEGLIGENCE — INFANTS. — Where a person has upon his premises machinery, tools, implements, or property which are dangerous to children as playthings or otherwise, and in their nature affording special temptation to children, he must guard them so as to protect himself from liability for injuries sustained by children while playing with them: Note to *Westbrook* v. *Mobile etc. R. R. Co.*, 14 Am. St. Rep. 595, 596; *Morrissey* v. *Providence etc. R. R. Co.*, 15 R. I. 271. And this rule has been applied to turn-tables of railway companies left unguarded and unfastened in public localities: Note to *Westbrook* v. *Mobile etc. R. R. Co.*, 14 Am. St. Rep. 595; *O'Malley* v. *St. Paul etc. R'y Co.*, 43 Minn. 289; *Gulf etc. R'y Co.* v. *McWhirter*, 77 Tex. 356; 19 Am. St. Rep. 755.

NEGLIGENCE — MEASURE OF DAMAGES FOR KILLING A CHILD. — A pecuniary injury resulting from the death of a child must be measured by the standard of the pecuniary value of the life of the child, and its loss to the person or persons entitled to damages: *Rajnowski* v. *Railroad Co.*, 74 Mich. 21. A parent may recover the loss of his child's services, as damages resulting from his death through the negligence of a railroad company: *Perry* v. *Georgia R. R. & B. Co.*, 85 Ga. 193; but it must appear that the parent was dependent upon the child, to enable him to recover for the value of the life of the deceased child: *Clay* v. *Central R. R. & B. Co.*, 84 Ga. 345. Under the Colorado statute, the parents of an unmarried adult child may recover damages measured by their pecuniary loss resulting from the death of such child through another's negligence: *Denver etc. R. R. Co.* v. *Wilson*, 12 Col. 20; and to the same effect, substantially, is *Fordyce* v. *McCants*, 51 Ark. 510. Compare *Louisville etc. R'y Co.* v. *Goodykoontz*, 12 Am. St. Rep. 381–383.

NEGLIGENCE IS ORDINARILY A QUESTION FOR THE JURY to determine: *Lazell* v. *Kapp*, 83 Mich. 36; *Chicago etc. Co.* v. *Havelick*, 131 Ill. 179; *Lake Shore etc. R'y Co.* v. *Parker*, 131 Ill. 558; *Abbot* v. *Dwinell*, 74 Wis. 515; *Walker* v. *Boston etc. R. R. Co.*, 64 N. H. 414; *Fisher* v. *Monongahela etc. R'y Co.*, 131 Pa. St. 293; *Murray* v. *Missouri P. R'y Co.*, 101 Mo. 236; 20 Am. St. Rep. 601, and note; and so is the question of contributory negligence; *Sampson etc. Co.* v. *Schaad*, 15 Col. 197; *Mathews* v. *Cedar Rapids*, 80 Iowa, 459; 20 Am. St. Rep. 436, and note. But where the facts are undisputed, the question of negligence is one of law for the court: *Dewald* v. *Kansas City etc. R. R. Co.*, 44 Kan. 586; *Breece* v. *Powers*, 80 Mich. 172; *Wilson* v. *Pennsylvania R'y Co.*, 132 Pa. St. 27; *Wilkins* v. *St. Louis etc. R'y Co.*, 101 Mo. 94.

CASES

IN THE

SUPREME COURT

OF

ARKANSAS.

JONES *v.* ST. LOUIS, IRON MOUNTAIN, AND SOUTHERN RAILWAY COMPANY.

[58 ARKANSAS, 27.]

VALUE OF PERSONAL PROPERTY, HOW PROVED IN ABSENCE OF LOCAL MARKET. — Where the value of personal property cannot be fixed by the proof of local markets, it may be done by proof of value at the nearest point where similar property is bought and sold, with proper addition or deduction for cost of transportation and the hazard and expense incident thereto, according as the property is held for sale or for use. But evidence of the value of such property in a distant market is not admissible unless it is proved that there is no adequate local market, or that the two markets are interdependent and sympathetic.

DEPOSITION EXCLUDED FOR INCOMPETENCY SHOULD BE OFFERED ANEW, IF SUBSEQUENT EVIDENCE REVEALS ITS COMPETENCY. — A deposition which is properly excluded for incompetency in the state of the case when it is offered should be offered in evidence again, if subsequent evidence reveals its competency. And if the party offering it fails to do this, he cannot complain of the ruling of the court excluding it.

ACTION to recover damages for the killing of a colt in White County. Before the trial, the court, on motion of the defendant, excluded certain parts of the depositions of certain witnesses residing at Leslie, Michigan, tending to prove the value of the colt at that place. The plaintiff subsequently showed that there was no adequate local market for such an animal at the place of the killing. The plaintiff, who claimed the colt to be worth one thousand dollars, recovered a verdict for four hundred dollars, and he appealed, alleging as error the exclusion of said testimony.

W. R. Coody, for the appellant.

Dodge and Johnson, for the appellee.

HEMINGWAY, J. For an injury to property, the owner is entitled to be compensated by a recovery against the wrong-doer to the extent of his injury. If personal property be damaged to the extent of destruction, its owner may have compensation by a recovery of its value at the time and place of its destruction. The correct rule for measuring the damage is found in a statement of the right, and about it there is no room for difference. But difficulty in applying the rule in different cases has arisen in determining what evidence is competent to prove the value of property destroyed.

To establish value, as to prove other facts, the law requires the best evidence that can be had. In most cases this rule would require proof of value in the market at the time and place of the injury; for if the property was held for sale, this shows the extent of the loss in not being able to sell it; and if it was held for use, this shows what it would cost to replace it.

But while the principle which exacts the best evidence is general, what constitutes the best evidence varies with the circumstances of the different cases. There may have been, in a particular case, an injury to property of a kind not sold, and therefore without market value, at the place of injury; still, it had a value there, either for its utility or because it might be transported and sold at distant markets; and as all rules of evidence are adopted for practical purposes in the administration of justice, they should not preclude a recovery because a loss occurred at a place where there was no market for the particular kind of property. The law accomplishes no such result, but accords to the party injured the right to recover the amount of his loss, and exacts no more in proof of the amount than the best evidence of which his case is susceptible. This implies that proof of the market price at other points may be admitted; but does it imply that proof may be admitted of the market price at any or all distant points at which there may be a market? This conclusion would be as unreasonable as that the absence of a local market should exclude all proof of value.

It would not be contended that in an action by a farmer in one of our Western states for corn destroyed in his barn, it would be competent to prove the value of corn in Dublin; or

that in trover for furs converted in Alaska, it would be competent to prove the value of similar articles in Berlin or Rome. If such proof tended in some slight degree to establish value, other and better proof is, in the nature of things, to be had tending more nearly and directly to that result.

As the aim of the law is, in such cases, to ascertain value, courts should not admit proof of it which is to a great extent misleading, when it is susceptible of proof without the misleading elements that is manifestly to be had.

So we find it established that where value cannot be fixed by the proof of local markets, it may be done by proof of value at the nearest point where similar property is bought and sold, with such addition or deduction for cost of transportation, and the hazard and expense incident thereto, as may be necessary to determine its actual value at the place of the injury. If it was held for sale, the amount of recovery should be a sum which would have been realized upon a sale, and in such case there should be a deduction from its value in the distant market; while if it was held for use, the recovery should be of a sum sufficient to replace it, and there should be an addition to the price in the distant market to meet the cost and hazard of transportation: *Coolidge* v. *Choate*, 11 Met. 79; *Grand Tower Mining Co.* v. *Phillips*, 23 Wall. 471; 2 Sutherland on Damages, 378.

In what we have said we have not attempted to formulate a rule of universal application; for there are states of case in which courts, in order to ascertain actual value and arrive at a just finding, have adopted a different rule for the admission of evidence, not violating, but really conserving, the principles that we have announced.

Thus in the case of *Harris* v. *Panama R. R. Co.*, 58 N. Y. 660, which was an action for killing a race-horse on the Isthmus of Panama, the court held that proof of the value of the horse in San Francisco was admissible, it appearing that there was no local market for such animals, and that it was being transported to San Francisco when killed.

So in other cases, it is held that proof of distant markets may be received when they and the local market are interdependent or sympathetic: 2 Wharton on Evidence, 1290.

The absence of a local market was not disclosed by the state of case when the court suppressed the depositions, nor did it appear that the market value of similar animals in Leslie, Michigan, had any reasonable or satisfactory tendency

to prove the value of plaintiff's animal when and where it was killed. No such deduction could be drawn from the relative situation of the two places, or from their ordinary business intercourse. It follows that the depositions were irrelevant and incompetent.

If for any reason not apparent they were competent, the plaintiff should have advised the court of the reason, with an offer to prove it on the trial; if he had done so, the court would doubtless have admitted the depositions when proof revealed their competency. As plaintiff failed to do this, the court could determine the question of relevancy only in the light of the depositions excepted to and the pleadings; and as they disclosed no relevancy, it was right in sustaining the motion to suppress.

If in the progress of the trial plaintiff made proof in connection with which the depositions became competent, he should then have offered them in evidence; this he failed to do. If he had done so, and the court had excluded them, we would be called to decide whether they were competent, in connection with the proof that there was no market for the injured animal at the place of its injury. But the circuit court did not rule on that state of the case, and it is not before us for review.

No other ground of reversal is urged, and as there was no error in the court's action in this regard, the judgment will be affirmed.

PERSONAL PROPERTY, VALUE OF, HOW DETERMINED. — The price for which goods sold at auction is admissible as evidence of their value: *Kent* v. *Whitney*, 9 Allen, 62; 85 Am. Dec. 739. The market value of property at a given time is presumed to be the highest price obtainable for it at that time, in the absence of proof to the contrary: *Kisling* v. *Shaw*, 33 Cal. 425; 91 Am. Dec. 644. Evidence that personalty has no market value is immaterial, where it is shown that the property was never offered for sale: *Doran* v. *Eaton*, 40 Minn. 35. The value of four bales of cotton in a city in Georgia cannot be proved by showing the value of six bales of cotton in a city in Ohio: *Simpson* v. *Cincinnati etc. R'y Co.*, 81 Ga. 496. The price for which the owner of a number of fruit-trees had contracted to sell them at the point of destination is admissible as affording some evidence of their value at that place: *Clements* v. *Burlington etc. R'y Co.*, 74 Iowa, 442. Where the animal whose value is in question is merely a graded Jersey cow, evidence as to the value of a thoroughbred Jersey cow at the time and place of the accident is inadmissible: *Western R'y Co.* v. *Lazarus*, 88 Ala. 453.

In ascertaining the value of property for taxation, consideration may be taken as to its market value at a sale for cash which is not a forced sale, and its profit-yielding capacity: *State* v. *Bienville Water S. Co.*, 89 Ala. 325.

BOWDEN v. BLAND.

[58 ARKANSAS, 53.]

COURT OF EQUITY CANNOT REFORM DEED OF MARRIED WOMAN. — A court of chancery cannot reform the deed of a married woman not acting as a *feme sole*. And where a husband and wife join in a conveyance of her land, which by mistake conveys only her dower interest therein, although she intended to convey her entire estate, acts passed to cure defectively acknowledged deeds of married women do not apply to such conveyance.

EJECTMENT. The opinion states the case.

W. S. McCain, and Wells and Williamson, for the appellants.

Harrison and Harrison, for the appellees.

HUGHES, J. Appellants brought an action of ejectment for an undivided one-seventh interest in the "Wiley place," in Drew County, alleging that the plaintiffs' ancestor, Catherine Bowden, inherited a one-seventh interest in the land from her father, Edward Wiley, who died seised of the land; that plaintiffs inherited from said Catherine, and that defendants are in possession under a deed made in 1882 by Catherine's husband, Jesse Bowden, Sen., tenant by the curtesy, to one Bowling, under whom defendants (appellees) claim by mesne conveyances; that Bowden, the tenant by the curtesy, is dead, and that defendants (appellees) refuse to surrender, pray judgment for possession, and for rents and profits. Defendants answered, admitting the above facts, but stating as a defense that Catherine Bowden, the maternal ancestor of the plaintiffs, intended to join her husband in the deed to Bowling as a grantor in fee, but that, by mistake of the parties and the draughtsman who prepared the deed, it was so worded as to purport to convey only a dower interest in the land upon her part. They pleaded the statute of limitations, which, however, is not insisted on in the brief of counsel, and will be treated as waived. They made their answer a cross-complaint; averred that the plaintiffs, as heirs of Jesse Bowden, had inherited from his estate assets equal in value to their interest in the land in controversy; that they had made valuable improvements upon the land; pleaded a counterclaim, prayed that plaintiffs' complaint be dismissed, and that their title be quieted. The cause was transferred to equity. Appellants demurred to the cross-complaint and counterclaim. The demurrer was overruled, and they excepted.

The appellants then filed their separate answers to the

counterclaim and cross-complaint of appellees, and the chancellor, having found the facts alleged in the answer to be true as to the intention and purpose of Mrs. Catherine Bowden in the execution of the deed to Bowling, dismissed plaintiffs' complaint, decreed reformation of Mrs. Bowden's deed, and that the title of appellees be quieted. Appellants prayed an appeal, and brought the cause to this court.

The main question presented in the case is, Has a court of chancery the power to reform the deed of a married woman made in 1852? The deed of Mrs. Catherine Bowden is not defective in execution or acknowledgment; it is executed in good form, and properly acknowledged. But it is the deed of the husband in fee to the wife's land, in which the wife joined, purporting only to relinquish a right or possibility of dower.

In *Martin* v. *Hargarding*, 46 Ill. 322, it was adjudged that "where the husband and wife joined in the execution of a mortgage, which by mistake described the wrong tract of land, a court of chancery has no power to correct the mistake so that the relinquishment of dower shall apply to land not described in the mortgage, although such land was intended by all the parties to be described therein." At common law, a married woman had no power to convey her land, except by fine and recovery, and it is only by statutory enlargement of her powers that she can now do so. "The conveyance of a *feme coveri*, except by some matter of record, was absolutely void at law. If there is a defect in a wife's conveyance, rendering it void at law, it is equally so in a court of equity; and the latter tribunal has no jurisdiction to cure it, or compel a conveyance from her in due form, even though the purchase-money has been paid": 2 Kent's Com. 150; 1 Bishop on Married Women, sec. 599; *Leonis* v. *Lazzarovich*, 55 Cal. 52; *Drury* v. *Foster*, 2 Wall. 24; *Knowles* v. *McCamly*, 10 Paige, 342; *Gebb* v. *Rose*, 40 Md. 387; *Townsley* v. *Chapin*, 12 Allen, 476. By a decided weight of authority, it is well settled that a court of chancery cannot reform the deed of a married woman not acting as a *feme sole*. It is well settled in this state that a court of equity will not decree specific performance of a married woman's agreement in writing to convey her land: *Milwee* v. *Milwee*, 44 Ark. 112; *Rockafellow* v. *Oliver*, 41 Ark. 169; *Felkner* v. *Tighe*, 39 Ark. 357; *Wood* v. *Terry*, 30 Ark. 385; *Rogers* v. *Brooks*, 30 Ark. 612; *Stidham* v. *Matthews*, 29 Ark. 650.

This being true, a court of equity could not decree that the

intention of a married woman, not expressed in her deed, to convey the fee in her lands should be enforced. Do the curative acts of 1883 and 1885 make this deed of Mrs. Bowden effective? The first was passed in March, 1883, and was substantially re-enacted in 1885 (Acts of 1885, p. 191) as "An act for the better quieting of titles," and is as follows: "All deeds and other conveyances recorded prior to the first day of January, 1883, purporting to have been acknowledged before any officer, and which have not heretofore been invalidated by any judicial proceeding, shall be held valid to pass the estate which such conveyances purport to transfer, although such acknowledgment may have been on any account defective."

The second of these acts, passed on the 14th of March, 1883, is entitled "An act to cure defective acknowledgments," and is as follows: "All conveyances and other instruments of writing authorized by law to be recorded, or which have been heretofore recorded in any county in this state, the proof of the execution whereof is insufficient because the officer certifying such execution omitted any words in his certificate, ... shall be valid and binding as though the certificate of acknowledgment or proof of execution was in due form." In *Johnson* v. *Parker*, 51 Ark. 421, Chief Justice Cockrill, delivering the opinion of the court, said: "In the case of *Johnson* v. *Richardson*, 44 Ark. 365, we ruled that these provisions of the statute validated a previously defective acknowledgment of a relinquishment of dower, and that no vested right was disturbed thereby. In that case, however, the certificate of the officer showed that the wife had made an ineffectual effort to relinquish dower, and the curative acts were permitted to supply the defect in the certificate. But when the acknowledgment is in form for that purpose, the fact that the wife joins in the deed with her husband as grantor is sufficient to bar her dower, even though there is no clause in the deed expressly relinquishing it: *Dutton* v. *Stuart*, 41 Ark. 101. If she joins with her husband in the conveyance, as a grantor, her estate passes. The deed is sufficient to pass her title, right, or interest, whatever it may be, provided, only, the requirements of the statute as to acknowledgments are observed. A deed of general warranty purports to convey a perfect title or estate. Our statutes are designed to operate upon the ceremony of the execution of conveyances, — a subject wholly within the control of the legislature; and as was said

in Mrs. Richardson's case, *supra*, the power which prescribed the form to be observed in the execution of a conveyance has said that a non-compliance with it shall be excused, in order that the contract made by the parties shall have effect according to its purport."

But as the deed does not purport to convey the fee, but only a dower interest, and is not defective either in execution or acknowledgment, the curative acts do not apply. There is nothing for them to operate upon. It therefore follows that the chancellor erred in overruling appellants' demurrer to the cross-complaint of the appellees.

The decree is reversed, and as there seems to be an agreement of counsel, implied from their briefs in the case, that the appellees are entitled to betterments, the clerk of this court is directed to ascertain and state the value of same.

MARRIED WOMEN — DEEDS. — A married woman can only pass her title to land in the manner provided by statute; and the burden is upon the party claiming under her deed to show that such deed was executed and acknowledged as required by law: *Logan* v. *Gardner*, 136 Pa. St. 588; 20 Am. St. Rep. 939, and note; *Hayden* v. *Moffatt*, 74 Tex. 647; 15 Am. St. Rep. 866, and note; *Franklin* v. *Pollard Mill Co.*, 88 Ala. 318; *Rooney* v. *Michael*, 84 Ala. 585; *Danglarde* v. *Elias*, 80 Cal. 65; *Gage* v. *Wheeler*, 129 Ill. 197; *Metler* v. *Miller*, 129 Ill. 631; *Thompson* v. *Smith*, 106 N. C. 357; *Rorer* v. *Roanoke Nat. Bank*, 83 Va. 589. A court of equity will not reform a deed, defectively executed by a husband and wife, purporting to convey the wife's land, on the ground of mistake: *Connor* v. *Armstrong*, 86 Ala. 262; nor will it specifically enforce such a deed: *Wynn* v. *Louthan*, 86 Va. 946; nor give any equitable relief whatever with respect thereto: *Cox* v. *Holcomb*, 87 Ala. 589; 13 Am. St. Rep. 79. But see *Gardner* v. *Moore*, 75 Ala. 394; 51 Am. Rep. 454, and note 458–462, as to what defects in the deeds of married women may be reformed in equity.

GRIFFITH *v.* LANGSDALE.

[58 ARKANSAS, 71.]

ATTACHMENT OF DEBTOR'S PROPERTY NOT ENJOINED WHEN. — When a debtor and his creditor are domiciled in different states, and the creditor in the courts of his own domicile proceeds to attach the property of the debtor which is exempt by the law of the latter's domicile, the courts of the debtor's domicile will not enjoin the creditor from proceeding, even though he is temporarily found within their jurisdiction; and if in such a case an injunction is improvidently granted, and the creditor violates it by taking judgment in a court of his domicile, and appropriating to its payment the property attached, the court that issued the injunction will not render judgment against the creditor for the value of the property so appropriated.

SUIT for injunction. Langsdale, a resident of Texas, sued Griffith, a resident of Arkansas, in a court in Texas. A non-resident citation was returned as served on Griffith in Arkansas. A writ of garnishment was issued against a debtor of Griffith resident in Texas, and returned served. A personal judgment was rendered against Griffith for the amount of the plaintiff's claim, and the debtor garnished in Texas answered admitting indebtedness to Griffith for personal services. Thereupon Griffith sued Langsdale in Arkansas to restrain him from prosecuting the garnishment proceeding in the Texas court, claiming that the latter was endeavoring to defraud him of his constitutional exemptions. A temporary injunction was granted. Pending this suit, the money garnished was paid by the garnishee; and these facts were set up in a supplemental complaint. After hearing, the complaint was dismissed, and the plaintiff appealed.

Arnold and Cook, for the appellant.

F. D. Cook, for the appellee.

COCKRILL, C. J. A creditor who attempts to evade the exemption laws of his state by resort to attachment proceedings in the court of another state against the property of a debtor who is a resident of the state of the creditor's domicile may be enjoined by the courts of the latter state from prosecuting his suit in the foreign jurisdiction: *Cole* v. *Cunningham*, 133 U. S. 107; *Keyser* v. *Rice*, 47 Md. 203; 28 Am. Rep. 448; *Snook* v. *Snetzer*, 25 Ohio St. 516; *Wilson* v. *Joseph*, 107 Ind. 490; *Hager* v. *Adams*, 70 Iowa, 746.

In restraining the proceeding, the court acts, not upon the court of foreign jurisdiction, but upon the person of the creditor: *Pickett* v. *Ferguson*, 45 Ark. 177; 55 Am. Rep. 545. The equitable jurisdiction in this class of cases arises from the creditor's effort to evade the law of the state of his domicile. When, therefore, the debtor and creditor are domiciled in different states, and the creditor proceeds by attachment in the courts of the state of his domicile against the property of his debtor, there is no cause for the interference by injunction on the part of the courts of the debtor's domicile, even though the creditor be temporarily found within their jurisdiction. That was the state of the case presented by the appellant in this cause. There was no error, therefore, in refusing the injunction.

But the creditor collected through his Texas attachment a

debt due the appellant after the complaint in this cause was filed. That fact was set up in an amendment to the complaint, and it is argued that the court erred in not rendering judgment *in personam* against him for the amount so collected. If it had been collected in disobedience of a rightful injunction, the plaintiff might have been entitled to that relief: *Hager* v. *Adams*, 70 Iowa, 746. But he was not entitled to that measure of relief for the disobedience of the provisional restraining order which had been improvidently issued. Nor does he show any other cause for the recovery from the appellee of the money collected by him under the Texas judgment. The effort of the Texas court to render a binding judgment *in personam* against the appellant, upon service of process had in Arkansas was futile; but a writ of garnishment was sued out at the institution of the suit and served upon the appellant's debtor, who paid the amount in suit to the appellee under the order of the Texas court.

The appellant's complaint contained no allegation that the Texas court was without jurisdiction to attach and condemn the debt. It admits the jurisdiction of the court, and seeks to avoid the effect of the judgment upon other grounds. But the jurisdiction to seize and condemn the debt being admitted, no ground for recovery is shown.

Affirm.

INJUNCTIONS, JURISDICTION WITH RESPECT TO. — While the courts of equity of one state may by injunction prevent its citizens from prosecuting suits in another state: *Pickett* v. *Ferguson*, 45 Ark. 177; 55 Am. Rep. 545; *Engel* v. *Scheuerman*, 40 Ga. 206; 2 Am. Rep. 573; such as suits so instituted for the purpose of evading exemption laws: Note to *Mumper* v. *Wilson*, 2 Am. St. Rep. 242; yet after such a suit has been commenced by one in the courts of another state, a court of equity will not interfere with its prosecution: *Harris* v. *Pullman*, 84 Ill. 20; 25 Am. Rep. 416.

EXECUTION, EXEMPTION OF PROPERTY FROM. — Exemption laws have no extraterritorial effect, but are restricted in their operation to the state in which they are enacted: *Carson* v. *Railway Co.*, 88 Tenn. 646; 17 Am. St. Rep. 921, and note; note to *Mumper* v. *Wilson*, 2 Am. St. Rep. 240–242. Exemption laws cannot avail a debtor in a suit commenced against him in another state: *East Tennessee etc. R. R. Co.* v. *Kennedy*, 83 Ala. 462; 3 Am. St. Rep. 755, and note; *Harwell* v. *Sharp*, 85 Ga. 124; 21 Am. St. Rep. 149, and note. But see *Drake* v. *Lake Shore etc. R'y Co.*, 69 Mich. 168; 13 Am. St. Rep. 382, and note; *Stark* v. *Barr*, 39 Kan. 100; 7 Am. St. Rep. 537.

STATE NATIONAL BANK v. NEEL.

[58 ARKANSAS, 110.]

JUDICIAL SALE, CONFIRMATION OF, IN DISCRETION OF COURT. — In judicial sales the court is the vendor, and it may confirm or refuse to confirm a sale made under its order, in the exercise of a sound judicial discretion. The court may confirm such sale upon the condition that the purchaser shall increase his bid to a certain amount.

ORDER CONFIRMING JUDICIAL SALE IS FINAL JUDGMENT. — An order confirming a judicial sale is a final judgment, and the court has no power to set it aside at a term subsequent to that at which it is rendered.

PETITION. The opinion states the case.

N. T. White, for the appellants.

M. L. Bell, for the appellee.

HUGHES, J. In the suit of appellants, attaching creditors of C. M. Neel, John M. Clayton was appointed receiver, and was ordered by the court to sell part of the property that came to his hands; and on the 14th of February, 1887, the receiver filed his report of the sale. Exceptions were filed to his report of the sale of eighty-two mules, purchased by C. M. Neel, Jr., by the creditors, who alleged that the price at which they were bid off was inadequate, being an average of $63.72 per head, and they offered, if a resale should be ordered, to make them bring $90 per head. The court ordered that unless C. M. Neel, Jr., would pay the sum of twenty dollars per head more than his bid for the mules, the sale should be set aside, and a resale ordered, but that if he would accept the terms proposed, and give his note for the increased price, the sale should be confirmed. Neel accepted the terms, and gave his note accordingly. This was at the March term (tenth day of March), 1887, of the Jefferson circuit court. At the same term of court, on the 17th of June, 1887, C. M. Neel, Jr., filed his petition to be relieved of the $1,640, the increased price of the mules as fixed by the court. On the 13th of July, 1887, after the attachments of appellants had been sustained, the court ordered the receiver to disburse the funds amongst the various creditors. At the September term of the court in 1887, on the tenth day of January, 1888, the court appointed the receiver and two other persons a committee to ascertain and report to the court the value of the eighty-two mules purchased by C. M. Neel, Jr., and the reasonableness of the bid therefor. The receiver reported that the mules were worth from eighty to one hundred dollars, and one of the other

committeemen reported that the first sale was a fair one, and that the price bid for the mules was reasonable. The other committeeman did not report. On the 24th of February, 1888, the court made an order revoking the order of the 10th of March, 1887, and relieved the said C. M. Neel, Jr., from the payment of the $1,640, the amount of the increase in the price of the mules over his bid for the same. An appeal was taken from this last order. Had the court the power to make this order, setting aside the order of confirmation of the sale, after the lapse of the term at which the confirmation was made? Was the order of confirmation a final judgment from which an appeal would lie?

In judicial sales, the court is the vendor, and it may confirm or refuse to confirm a sale made under its order, in the exercise of a sound judicial discretion: *Penn* v. *Tolleson*, 20 Ark. 661; *Sessions* v. *Peay*, 23 Ark. 39; *Thomason* v. *Craighead*, 32 Ark. 391; *Morrow* v. *McGregor*, 49 Ark. 67; Rorer on Judicial Sales, secs. 124, 126, 128, 394–396. It was within the discretion of the court to refuse to confirm the sale as originally made to C. M. Neel, Jr., and to confirm it upon his acceptance of the terms of the court's order that it would be confirmed upon his agreeing to pay twenty dollars in addition to his bid on the average price of the eighty-two mules. When Neel had done this, the sale was confirmed, and he became liable to the attaching creditors of C. M. Neel, Sen., for the $1,640. C. M. Neel, Jr., became a party to the controversy only by becoming the accepted bidder at the sale.

The confirmation of the sale vested in him the title to the mules, and determined all questions as to the sale, and was a final adjudication and judgment as to its regularity, reasonableness, etc., and left nothing further to be considered or done in regard to it. It was a final order upon this branch of the case, from which an appeal could be taken: *Sessions* v. *Peay*, 23 Ark. 39; *Penn* v. *Tolleson*, 20 Ark. 652; Rorer on Judicial Sales, secs. 24, 25, 132; *Koehler* v. *Ball*, 2 Kan. 160; *Williams* v. *Field*, 2 Wis. 421; 60 Am. Dec. 427, and cases cited in note. It cannot be assumed that there was any fraud by which the confirmation of the sale was procured, or any mistake in making the order of confirmation, for which the same should have been set aside; nor did the purchaser bring his application to vacate the order of confirmation within any of the provisions of section 3909 of Mansfield's Digest. When the term of the court at which the order of confirmation of the

sale was made lapsed, the order became final, and the court had no power to set it aside at a subsequent term: *Turner* v. *Vaughan*, 33 Ark. 454; *Ex party Hardy*, 26 Ark. 94; *Leigh* v. *Armor*, 35 Ark. 123; *State* v. *Shall*, 23 Ark. 601.

Wherefore the judgment of the Jefferson circuit court setting aside the order of the 10th of March, 1887, and releasing C. M. Neel, Jr., from his agreement to pay $1,640, which he agreed to pay in addition to his first bid for the eighty-two mules sold by John M. Clayton as receiver, was erroneous, and is reversed, and this cause is remanded for further proceedings in this behalf.

Judicial Sale, Confirmation of. — The approval or disapproval of a judicial sale rests in the discretion of the court: *Moran* v. *Clark*, 30 W. Va. 358; 8 Am. St. Rep. 66; for the court has complete control over the conduct of the officers making a judicial sale, until after the report of such sale has been confirmed: *Vanmeter* v. *Vanmeter*, 88 Ky. 448. A judicial sale is not complete, nor is the bidder considered an actual purchaser, until the sale has been confirmed: *Virginia F. etc. Ins. Co.* v. *Cottrell*, 85 Va. 857; 17 Am. St. Rep. 106, and note; *Neal* v. *Andrews*, 53 Ark. 445.

Judicial Sale, an Order Confirming the Report of, is final, and cannot be vacated or modified by the court after the term at which it was made: *Kincaid* v. *Tutt*, 88 Ky. 392.

Judicial Sale, Effect of Confirmation of. — Before confirmation of a judicial sale, biddings may be opened on an offer to advance the price in a sum deemed adequate; but this cannot be done after confirmation, except in the case of fraud, accident, etc.: *Houston* v. *Aycock*, 5 Sneed, 406; 73 Am. Dec. 131; *Utterback* v. *Mehlenger*, 86 Va. 62.

St. Louis, Iron Mountain, and Southern Railway Company *v.* Bennett.

[36 Arkansas, 206.]

Road-master of Railway Company has No Implied Authority to Bind It to Pay its Employees' Board. — It is not incident to the operation of a railroad to board the company's employees; and it is not within the apparent scope of the authority of its road-master to bind the company to pay for the board of its employees.

Principal's Assent Necessary to Bind Him for Acts of Agent Outside of Apparent Scope of his Authority. — The authority of an agent to bind his principal in matters outside of the apparent scope of his authority is not established by proof of the bare fact that he has exercised such authority, unless it is also proved, or the circumstances justify the inference, that the person to be charged as principal assented to such acts.

THE opinion states the case.

Dodge and Johnson, for the appellant.

COCKRILL, C. J. The appellee furnished board to employees of the railway, and failing to receive his pay, sued the railway therefor, claiming that the road-master of the company had employed him to board the men for the company. There was a jury trial, and a verdict and judgment for the plaintiff. The railway insists that the proof fails to show that the road-master was authorized to charge it by contract for the purpose. We quote all the proof upon that point. It was, that the company's road-master had "made contracts to board section-men all along the road"; and that it was "the custom of railroads in that section of country for road-masters to hire boarding bosses."

Now, it is not incident to the operation of a railroad that it should pay the board of its employees. It is not within the apparent scope of the authority of a road-master to bind the company to do so; and his contract to pay for board does not bind the company, unless he was expressly authorized, or the facts justify the inference that he had the implied authority. There is no reason to contend that there was express authority, and the question is, Can the proof be said to justify the jury in the conclusion that he had implied authority?

Whether the contract which the road-masters were in the habit of making was of a character to bind the company to pay the board of its employees, or to see that the employees settled their accounts, or what the nature of the contract was, is not disclosed. But conceding that the usage of the road-masters on other roads would, in any event, be competent proof to throw liability upon the defendant for the unauthorized action of its road-master, it could only be when it was shown that there was a well-defined and publicly known usage for road-masters to bind the company to pay the board of its employees unconditionally. The nature of the contracts which the defendant's own road-master had frequently made is not clearly defined; but whatever it was, the proof fails to show that knowledge of the fact that he had made contracts was ever brought home to the company, or that it ever ratified or assented to the road-master's action in any form. The employees may have paid their own board without the road-master's contracts being made known to the company, or the

company may have repudiated all the other contracts made by him, just as it does this one.

When one has frequently authorized his agent to do acts outside the line of his ordinary employment and beyond the scope of his apparent authority, or has commonly ratified such acts when done, other persons, with knowledge of the facts, who deal with him in reference to similar matters, are justified in presuming that he is empowered by his principal to bind him in reference thereto. But the authority is not established by proof that the agent has frequently so acted, unless it is also proved, or the circumstances justify the inference, that the person to be charged as principal assented to such acts. The authority of an agent is never proved by the bare fact that the person claiming the power has exercised it. That alone proves nothing against the supposed principal. Yet that is all that was proved in this case.

The verdict is not sustained by the evidence, and the judgment must be reversed, and the cause remanded for a new trial.

Agency— Principal's Liability for Agent's Unauthorized Acts. — As to third persons, a principal is bound by the acts of his agent done within the apparent scope of his authority: *Wachter* v. *Phœnix Assur. Co.*, 132 Pa. St. 428; 19 Am. St. Rep. 600; *Tunison* v. *Detroit etc. Co.*, 73 Mich. 452; *American G. Co.* v. *Minneapolis etc. R'y Co.*, 44 Minn. 93; *Levy* v. *First Nat. Bank*, 27 Neb. 557; *Lorton* v. *Russell*, 27 Neb. 372; *Wait* v. *Borne*, 123 N. Y. 592; *Estey* v. *Snyder*, 76 Wis. 625; *Du Souchet* v. *Dutcher*, 113 Ind. 249; *Knowles* v. *Street*, 87 Ala. 357; *Bergstrom* v. *Franklin*, 74 Tex. 38. And this is true, notwithstanding private instructions to the agent, limiting his authority, which are not known to third persons: *Wachter* v. *Phœnix Assur. Co.*, 132 Pa. St. 428; 19 Am. St. Rep. 600; *Rosser* v. *Darden*, 82 Ga. 219; *English* v. *Ayer*, 79 Mich. 516; *Tice* v. *Russell*, 43 Minn. 66; *Ruggles* v. *American Ins. Co.*, 114 N. Y. 415; 11 Am. St. Rep. 674, and note; *Phœnix Ins. Co.* v. *Spiers*, 87 Ky. 286; *Howell* v. *Graff*, 25 Neb. 130.

But it is equally well settled that a principal cannot be bound by the acts of his agent when they are done outside the actual or apparent scope of his authority: *Edwards* v. *Dooley*, 120 N. Y. 540; *Smith* v. *James*, 53 Ark. 135; *Vescelius* v. *Martin*, 11 Col. 391; *Ames* v. *Moir*, 130 Ill. 583; *Deatherage* v. *Henderson*, 43 Kan. 685; *Kane* v. *Barstow*, 42 Kan. 465; 16 Am. St. Rep. 490, and note 493, 494. In *Kane* v. *Barstow*, 42 Kan. 465, 16 Am. St. Rep. 490, it is decided that the rule that a principal is bound by the acts of his agent within the apparent scope of his authority is applicable only when there have been prior transactions of a like nature, in which the agent exceeded his authority, but which were ratified by the principal in such a manner as not to convey to third parties notice of a limitation of the agent's authority. And it has been decided that an agent's authority may be proved from the habits and course of business pursued by his principal in previous transactions of the same character: *Mitchum* v. *Dunlap*, 98

Mo. 419; *Robinson* v. *Nevada Bank*, 81 Cal. 106. The burden is upon the party maintaining that an ostensible authority existed, to prove that he knew of the facts giving color of authority to the supposed agent: *Harris* v. *San Diego F. Co.*, 87 Cal. 526.

A principal may, however, render himself liable for acts done by his agent not within the actual or apparent scope of his authority, by a subsequent ratification thereof: *Du Souchet* v. *Dutcher*, 113 Ind. 249; *Lee* v. *Lord*, 76 Wis. 582. And a ratification may be presumed from the principal's acquiescence or silence: *King* v. *Rea*, 13 Col. 69; *Cooper* v. *Mulder*, 74 Mich. 375. But no ratification can be made by the principal without full knowledge of all the facts: *Singer Mfg. Co.* v. *Belgart*, 84 Ala. 519; *Hurley* v. *Watson*, 68 Mich. 531. For instances where the evidence failed to show a ratification on the part of the principal, see *Beebe* v. *Equitable etc. Ass'n*, 76 Iowa, 129; *Hebert* v. *Roehn*, 43 Minn. 271; *Tate* v. *Marco*, 27 S. C. 493; *Engfer* v. *Roemer*, 71 Wis. 11. A subsequent ratification by a principal of an unauthorized act of his agent will not infringe the rights of third persons, acquired between the act of the agent and its ratification by the principal: *Pinckney* v. *Inglesby*, 28 S. C. 345; *Hardware Co.* v. *Deere*, 53 Ark. 140.

Where a person deals with an agent having a special authority, he must acquaint himself with the extent of such agent's authority: *Hurley* v. *Watson*, 68 Mich. 531; *Foster* v. *Virtue*, 17 Or. 607. For when the agent exceeds his powers, the principal is not liable: *Blair* v. *Sheridan*, 86 Va. 527; unless he subsequently ratifies the act: *Railroad Co.* v. *Yates*, 24 Fla. 64. The burden of showing a ratification is upon him who alleges it: *Hurley* v. *Watson*, 68 Mich. 531.

TRIBLE *v.* NICHOLS.

[58 ARKANSAS, 271.]

SUBROGATION, RIGHT TO, CANNOT ARISE FROM AGREEMENT VOID FOR USURY. — There is no basis for the application of the equitable doctrine of subrogation, where the claim to such subrogation grows out of an agreement which is void by reason of usury. Where, therefore, the owner of land, to secure a valid loan, conveys it to another by a deed absolute in form, and subsequently, in order to pay off this loan, borrows money from a third person at a usurious rate of interest, and procures the former grantee to convey it to such third person by an absolute deed, such conveyance is void, and the latter grantee will not be subrogated to the rights of the former.

UNLAWFUL DETAINER. The opinion states the case.

A. B. and R. B. Williams, for the appellant.

Atkinson and England, for the appellee.

COCKRILL, C. J. Trible borrowed money from Oglesby, and, to secure the loan, executed to him a deed absolute in form to the land in question. Subsequently, at Trible's request, Oglesby executed a deed to the same land to Nichols. We think the chancellor was amply sustained by the proof in the finding

that the consideration for the deed from Oglesby to Nichols was a usurious loan of money from Nichols to Trible, the deed being intended as security therefor. A part of the loan was applied by Nichols, at the request of Trible, in paying off Trible's debt to Oglesby; the residue was paid to Trible. The chancellor held that Nichols should be subrogated to the rights that Oglesby had under his mortgage, and decreed a foreclosure of the same for Nichols's benefit. The correctness of that ruling is the legal question presented by the appeal.

The general rule is well established that one who, at the request of another, pays off an encumbrance upon the latter's land is entitled to be subrogated to the security; and it is also a settled rule that when a valid security is canceled by means of a subsequent agreement and security which is void for usury, the original security is not invalidated, but equity will revive and enforce it. But Nichols cannot invoke the aid of either of these principles. One who seeks protection under the equitable doctrine of subrogation must come into court with clean hands. It is not applied to relieve one of the consequences of his own wrongful or illegal act. Where, therefore, the claim to subrogation grows out of an agreement which is void by reason of usury, it furnishes no basis for the equitable doctrine: Sheldon on Subrogation, secs. 42, 44; *Perkins* v. *Hall*, 105 N. Y. 539.

If Nichols had been the owner of the Oglesby mortgage, and subsequently entered into the usurious contract he actually made, and by means of it had canceled the first mortgage, the case would be like that of *Gerwig* v. *Sitterly*, 56 N. Y. 214, which he relies upon to sustain his contention. There it was not necessary to resort to the illegal contract to take the benefit of the binding security. And in *Patterson* v. *Birdsall*, 64 N. Y. 294, 21 Am. Rep. 609, the other case relied upon by Nichols, it did not become necessary to resort to any dealings between the usurer and the debtor, in order to establish the right to the first mortgage when the usurious security was annulled. But the position of Nichols is such that he is forced to resort to proof of his illegal contract to establish any claim whatever. The agreement to take the legal title from Oglesby, who held it in trust for Trible, instead of from Trible himself, and the payment of Oglesby's debt, are inseparable parts of the usurious agreement. But as it is against the policy of the law to found any right upon an illegal contract, Nichols cannot have the benefit of the Oglesby mortgage.

The two cases cited by Nichols are commented upon and distinguished from this class of cases in *Perkins* v. *Hall*, 105 N. Y. 539, and *Baldwin* v. *Moffett*, 94 N. Y. 82.

Reverse the judgment, and remand the cause, with directions to enter judgment for Trible. Nichols will be decreed the amount of taxes paid on the land, as found by the court below, and interest.

SUBROGATION, WHEN THE RIGHT TO, ARISES, AND WHEN NOT. — Subrogation "is an equity by which one person, who is secondarily liable for a debt, and has paid the same, is put in the place of the creditor, so as to entitle him to make use of all the securities and remedies possessed by the creditor, in order to enforce the right of exoneration, as against the principal debtor, of contribution against others who may be liable in the same rank with himself": Note to *Rowlett* v. *Grieve*, 13 Am. Dec. 297, 298; *Johnson* v. *Barrett*, 117 Ind. 551; 10 Am. St. Rep. 83, and note; *Appeal of Forest Oil Co.*, 118 Pa. St. 138; 4 Am. St. Rep. 584, and note. But subrogation cannot be allowed when it conflicts with the legal or equitable rights of other creditors of the common debtor: *Fidelity Ins. etc. Co.* v. *Shenandoah V. R. R. Co.*, 86 Va. 1; 19 Am. St. Rep. 858; *Greenlaw* v. *Pettit*, 87 Tenn. 467.

HECHT *v.* SKAGGS.

[53 ARKANSAS, 291.]

SURETY'S LIABILITY ON ADMINISTRATOR'S BOND IS NOT TERMINATED BY HIS DEATH, but extends to the entire term of the administration.

DEVISEE OF SURETY LIABLE TO MAKE CONTRIBUTION WHEN. — Where the liability of a deceased surety to make contribution to his co-surety is not incurred until after his estate is fully administered, and land exceeding in value the amount of his liability passes to his devisee, judgment against the latter will be rendered for the amount of the liability, to be charged as a lien upon such land.

ACTION by the plaintiff against the defendant to compel her to make contribution as between co-sureties. J. P. Black, James Russell, and plaintiff Hecht became sureties on an administrator's bond. Russell died, leaving property worth five thousand dollars to defendant as his sole devisee. Subsequently, judgment was rendered on the bond for $2,984, of which the plaintiff was compelled to pay $1,914. Plaintiff prayed that defendant be required to contribute the ratable share of this amount due from her testator. The court found that the waste by the administrator was committed after Russell's death, and dismissed the complaint. The plaintiff appealed. Other facts are stated in the opinion.

J. C. Hawthorne, for the appellant.

HEMINGWAY, J. The statute requires every person to whom letters of administration have been granted to execute a bond, with two or more sufficient sureties, to be approved by the clerk. The general tenor of the condition is, that the administrator shall well and truly administer, according to law, all and singular the goods and chattels, rights and credits, of the deceased which come to the hands, possession, or knowledge of the administrator, and shall well and truly do and perform all matters and things touching the administration that are or may be prescribed by law, or enjoined on the administrator by the order, sentence, or decree of any court of competent jurisdiction. The obligation of the surety in this bond is not limited by its terms to any period of time, but extends to the entire term of the administration; but the learned judge who tried this cause below seems to have considered that it was limited to breaches that occurred in the lifetime of the surety. There is no law that so provides.

The statute provides that that if any surety has become, or is likely to become, insolvent, or has died or removed from the state, the court may require a new bond to be given: Mansfield's Digest, sec. 34. But these are all contingencies that affect merely the financial sufficiency of the bond, and authorize, but do not require, the giving of a new one; and it could not be argued that either insolvency or removal effected a release from liability thereafter accruing. Why should the death of a surety have such an effect?

Where the contract of the decedent is personal, and contemplates in its performance the skill and service of the promising party, it is held that the contract does not survive. The rule may be illustrated by the contract of an artist to paint a picture or execute an engraving, or the contract of a surgeon to perform an operation. In such cases, the skill and service of the promising party is the essence of the contract, and it cannot be supposed that the deceased was promising such skill or service for his administrator.

But a contract to pay money survives, although it falls due after the death of the obligor. An administrator's bond is but a promise to pay money in the future. True, it is conditional, and no time of payment is fixed; but the contingency upon which the payment shall be made is declared, and there is no limitation placed upon the undertaking except a com-

pliance with its conditions. The surety could bind his legal representatives, and, by the terms of the contract under consideration, did so: Mansfield's Digest, sec. 3898; *Moore* v. *Wallis*, 18 Ala. 458; Brandt on Suretyship, sec. 113; *Royal Ins. Co.* v. *Davies*, 40 Iowa, 469; 20 Am. Rep. 581; *White's Ex'rs* v. *Commonwealth*, 39 Pa. St. 167; *Hightower* v. *Moore*, 46 Ala. 387; *Green* v. *Young*, 8 Greenl. 14; 22 Am. Dec. 218; *Knotts* v. *Butler*, 10 Rich. Eq. 143; *Gordon* v. *Calvert*, 2 Sim. 253.

It follows that the court erred in holding that the obligation of James Russell did not survive against his legal representatives.

The appellant, having paid on account of a breach of the condition of the bond various sums, — to wit, February 23, 1887, $137.97; April 16, 1887, $713.38; February 19, 1881, $350.51; and on the 14th of May, 1887, $713.38, — and the principal in the bond, as well as the third surety, being insolvent, is entitled to contribution against the estate of Russell, his cosurety, in half those amounts, with interest from the dates they were paid at six per cent per annum.

The estate of Russell was fully administered before the liability was fixed or the money paid, and lands exceeding in value the amount claimed for contribution passed to the appellee under his will. The appellant is therefore entitled to a judgment against appellee for the amount claimed as above, to be charged as a lien on the lands devised.

The judgment of the circuit court will be reversed and remanded, with directions to enter judgment in accordance with this opinion.

SURVIVAL OF ACTIONS, GENERALLY: See note to *Boor* v. *Lowrey*, 53 Am. Rep. 525–539. Actions for personal injuries do not survive against the personal representatives of the defendant: *Ott* v. *Kaufman*, 68 Md. 56. But an action may be maintained against the personal representatives of a deceased vendor to enforce his contracts for the sale of personalty: *Sabre* v. *Smith*, 62 N. H. 663. Judgments rendered against a defendant during his lifetime may be revived after his death: *Carr* v. *Rischer*, 119 N. Y. 117; *Grover* v. *Boon*, 124 Pa. St. 399.

SURETYSHIP — DEATH OF SURETY, AND LIABILITY OF HIS ESTATE. — One who obligates himself that another will faithfully perform the duties of an office is liable upon the default in the performance of such duties, even though the default takes place after the death of the surety: *Green* v. *Young*, 8 Greenl. 14; 22 Am. Dec. 218; *Suong* v. *Vaiden*, 10 S. C. 247; 30 Am. Rep. 50, and note 56–58. Compare *Rapp* v. *Phœnix Ins. Co.*, 113 Ill. 390; 55 Am. Rep. 427. In an action against the personal representatives of a deceased surety on a bond, evidence tending to show that such surety had forgotten all about the bond is incompetent: *Dickson* v. *Gourdin*, 29 S. C. 343.

St. Louis, Iron Mountain, and Southern Railway Company *v.* Ramsey.

[58 Arkansas, 314.]

Test of Navigability of River. — The test of the navigability of a river is its use as a navigable stream, or its capability of being used as such.

Riparian Owner on Navigable River Takes to High-water Mark only. — A riparian owner on a navigable stream who derives his title from the government of the United States takes to high-water mark only, and not to the middle of the stream.

High-water Mark, how Determined. — The line of high-water mark of a stream is to be found by examining the bed and banks, and ascertaining where the presence and action of water are so common and usual, and so long continued in all ordinary years, as to mark upon the soil of the bed a character distinct from that of the banks, in respect to vegetation, as well as in respect to the nature of the soil itself.

Accretion and Alluvion, Definitions of. — Accretion is the increase of real estate by the addition of portions of soil by gradual deposition through the operation of natural causes to that already in the possession of the owner. Alluvion is the term applied to the deposit itself, while accretion denotes the act.

Gravel Bar in Navigable River is not Alluvion when. — A gravel bar in the bed of a navigable river, over which steamboats can pass in ordinary high water, and on which no trees or soil grow, is not alluvion added to the land of the riparian owner.

Action to recover the value of certain gravel taken from a gravel bar in the bed of a river. The opinion states the case.

Dodge and Johnson, for the appellant.

H. S. Coleman and J. C. Yancey, for the appellees.

Hughes, J. Appellees being the owners as tenants in common by inheritance from an ancestor who derived title under a patent from the United States government of the northwest fractional part of section 21, township 13 north, range 6 west, on the bank of and bordering on White River, in Independence County, containing, according to the patent, 22.59 acres, the patent for which bears date the 12th of December, 1823, brought suit against the railway company to recover the value of 3,658 car-loads of gravel, which the appellant took from a gravel bar which the appellees alleged in their complaint was lying immediately adjacent to and between the high bank and the water in the main channel of White River. They alleged that this bar had formed against the bank by long years of accretion, and that it is not now part of the main or ordinary channel of the river, but that it has become a part of their said tract of land by accretion,

and lies immediately in front of the same between the banks of said stream.

The appellant answered, admitting the location, as described, of the tract of land, and the taking of the gravel from the bar, but denied that the gravel bar was a part of the tract of land owned by the plaintiffs.

The proof showed that the gravel bar was not a part of the northwest fractional quarter of section 21, township 13 north, range 6 west, but that it lay "in the river-bed, in front of the tract of land"; that twenty-five years ago, the bed of White River ran where the gravel bar now is; that before that time the river ran along the edge of the bank; that the gravel bar had formed slowly for years; that it is not above the ordinary stage of high water, and is bare at low water, and that a rise in the river from six to eight feet would cover it; that from ten to fifteen feet is an ordinary high-water rise, and would leave the gravel bar from five to eight feet under water; that no trees or soil grew on the bar; that the position is this: first, there is a high bank, then a second bottom, then a gravel bar, and then the water; that the second bottom is five or six feet higher than the bar; that any year, at some time, the water in the river rises from fifteen to twenty-two feet; that in ordinary high water, steamboats can pass right on the gravel bar in controversy; that there is a swag between the gravel bar and the bank, in which minnows have often been caught; that the water often rises over this gravel bar in one night.

The cause was submitted to a jury upon the evidence and instructions of the court, and there was a verdict for appellees, which, upon motion by appellant for a new trial, the court refused to disturb, whereupon appellant, having saved exceptions to the giving and refusing of instructions by the court, appealed.

The main question to be determined is, how far the ownership of the appellees in the land between the banks of the river in front of their tract extends by virtue of their ownership of the land upon the bank of the river under the patent from the government of the United States.

At common law, "as a general principle, the soil of ancient navigable rivers, where there is a flux and reflux of the sea, belongs to the crown, and that of other streams to the subject; that is, to the owners of the adjacent grounds, to each respectively, as far as the middle of the stream": Woolrych

on Waters, 44. The ebb and flow of the tide in a river was at common law the most usual test of its navigability, but was not a conclusive test: Woolrych on Waters, 40.

The soil under navigable streams, at common law, belonged to the king as *parens patriæ*, for the same reason that the waters did; that is, as a trust for the public use and benefit: Woolrych on Waters, c. 1, 2; Angel on Tide-waters, 19–67; Hale, De Jure Maris, cited in note to *Ex parte Jennings*, 6 Cow. 539; *Chapman* v. *Kimball*, 9 Conn. 38; 21 Am. Dec. 707.

Many states of the United States have held to the common-law test of the navigability of rivers, and to the doctrine that only those rivers are navigable in a legal sense in which the tide ebbs and flows; and there has been much discussion and conflict of authority upon this question; a majority in number, perhaps, of the courts of last resort maintaining the common-law doctrine. But the more reasonable test, as we conceive, of the navigability of a river is its use as a navigable stream, or its capability of being used as such. The ebb and flow of the tide is merely an arbitrary test, since many waters where the tide flows are not in fact navigable, and many, especially on this continent, where it does not flow are navigable. "It is navigability in fact that forms the foundation for navigability in law": *McManus* v. *Carmichael*, 3 Iowa, 1; *Genesee Chief* v. *Fitzhugh*, 12 How. 443.

While in England the ebb and flow of the tide is the most convenient, certain, and usual test of the navigability of rivers, as the tide in fact does ebb and flow in all the navigable rivers, it is wholly inapplicable in this country, where there are large fresh-water rivers thousands of miles long, flowing almost across the entire continent, bearing upon their bosom the commerce of the outside world in part, as well as of the continent. The longest river in England, the Thames, is only about 250 miles and the Severn is only about 210 miles in length.

If we apply the principle of the common law that the soils under the navigable waters belong to the sovereign for the benefit and use of the public, and are not governed by the common-law test of the navigability of streams, but by their navigability in fact, we are constrained to maintain that the true doctrine is, that the beds of navigable rivers belong to the state, notwithstanding the tide does not ebb and flow in them. In *Pollard's Lessee* v. *Hagan*, 3 How. 213, it is held that "the

shores of navigable waters, and the soils under them, were not granted by the constitution to the United States, but were reserved to the states respectively; and the new states have the same rights, sovereignty, and jurisdiction over this subject as the original states." And Mr. Justice McKinley, delivering the opinion of the court, at page 229, says: "Then to Alabama belong the navigable waters, and soils under them, in controversy in this case, subject to the rights surrendered by the constitution to the United States." And on page 230 he says: "To give to the United States the right to transfer to a citizen the title to the shores and the soils under the navigable waters would be placing in their hands a weapon which might be wielded greatly to the injury of state sovereignity, and deprive the state of the power to exercise a numerous and important class of police powers." *Goodtitle* v. *Kibbe*, 9 How. 471, affirms the doctrine of this case, and holds that the title to the soil in navigable waters below high-water mark is in the state.

In the case of *McManus* v. *Carmichael*, 3 Iowa, 1, the court held that by the acts of the United States relating to the survey and sale of public lands (see act of May 18, 1796, etc.), and also by the law establishing the general land-office, the whole bed of navigable rivers is excepted from the surveys, and that the lands of the United States are sold with reference to the plats and field-notes of the survey. It is also held in the same case that the rule that grants are to be construed most strongly against the grantor does not apply to public grants; but that the government being but a trustee for the public, its grants are to be construed strictly. This is familiar law. In *Middleton* v. *Pritchard*, 3 Scam. 510, 38 Am. Dec. 112, Mr. Justice Wilson, in a dissenting opinion, says, in regard to the sale of lands by the government: "The land authorized to be sold, and the mode of selling it, is prescribed by law, and all sales in violation of that are void. These surveys and plats are the guides of the land-officers in making their sales. They have no authority to sell a single acre that has not been surveyed."

In *Barney* v. *Keokuk*, 94 U. S. 324, Mr. Justice Bradley, in discussing this question, says, on page 336: "In this country, as a general thing, all waters are deemed navigable which are really so"; and on page 338 he says: "In our view of the subject, the correct principles were laid down in *Martin* v. *Waddell*, 16 Pet. 367; *Pollard's Lessee* v. *Hagan*, 3 How. 212; and *Good-*

title v. *Kibbe*, 9 How. 471. These cases related to tide-water, it is true; but they enunciate principles which are equally applicable to all navigable waters. And since this court, in the case of *Genesee Chief* v. *Fitzhugh*, 12 How. 443, has declared that the Great Lakes, and other navigable waters of the country above as well as below the flow of the tide, are, in the strictest sense, entitled to the denomination of navigable waters, and amenable to the admiralty jurisdiction, there seems to be no sound reason for adhering to the old rule as to the proprietorship of the beds and shores of such waters. It properly belongs to the states by their inherent sovereingty, and the United States has wisely abstained from extending (if it could extend) its surveys and grants beyond the limits of high water. The cases in which this court has seemed to hold a contrary view depended, as most cases must depend, on the local laws of the states in which the lands were situated."

But it is necessary to a full understanding of the rights of a riparian owner and of the public in the lands between the banks of a river to determine the legal meaning of the phrase "high water." It does not mean, as has been sometimes supposed, the line reached by the great annual rises, regardless of the character of the lands subject at such times to be overflowed. But, as decided in the case of *Houghton* v. *C. D. & M. R'y Co.*, 47 Iowa, 370, "high-water mark, then, as the line between the riparian proprietor and the public, is to be regarded as co-ordinate with the limit of the river-bed. Whatever difficulty there may be in determining it in places, this, doubtless, may be said: What the river does not occupy long enough to wrest from vegetation, so far as to destroy its value for agriculture, is not river-bed."

In *Howard* v. *Ingersoll*, 13 How. 381, Mr. Justice Curtis gave a satisfactory definition of the bank and bed of a river. He says: "The banks of a river are those elevations of land which confine the waters when they rise out of the bed; and the bed is that soil so usually covered by water as to be distinguishable from the bank by the character of the soil or vegetation, or both, produced by the common presence and action of flowing water. But neither the line of ordinary high-water mark nor of ordinary low-water mark, nor of a middle stage of water, can be assumed as the line dividing the bed from the banks. This line is to be found by examining the bed and banks, and ascertaining where the presence and action of water are so common and usual, and so long continued

in all ordinary years, as to mark upon the soil of the bed a character distinct from that of the banks, in respect to vegetation, as well as in respect to the nature of the soil itself. Whether this line between the bed and the banks will be found above or below or at a middle stage of water must depend upon the character of the stream. But in all cases the bed of a river is a natural object, and is to be sought for, not merely by the application of any abstract rules, but as other natural objects are sought for and found, by the distinctive appearances they present; the banks being fast land, on which vegetation appropriate to such land in the particular locality grows wherever the bank is not too steep to permit such growth, and the bed being soil of a different character, and having no vegetation, or only such as exists when commonly submerged by water."

The owner of land on the margin of a navigable stream in this state, holding under a grant from the United States government, does not take *ad medium filum aquæ*, but to high-water mark, as limited and defined above; and the beds of all navigable rivers in the state belong to the state, in trust, for the use of the public.

Was the gravel bar an accretion to appellee's land?

Accretion to a land on a stream navigable or unnavigable belongs to the owner of the land; therefore, if appellee's contention that this bar has become a part of his land by accretion has been maintained, the judgment of the circuit court is correct: *Warren* v. *Chambers*, 25 Ark. 120; 4 Am. Rep. 23; *New Orleans* v. *United States*, 10 Pet. 662; *Jones* v. *Soulard*, 24 How. 41; *Saulet* v. *Shepherd*, 4 Wall. 502; 1 Am. & Eng. Ency. of Law, sec. 5, p. 137, and cases cited. Accretion is the increase of real estate by the addition of portions of soil by gradual deposition through the operation of natural causes to that already in the possession of the owner. The term "alluvion" is applied to the deposit itself, while accretion rather denotes the act: 3 Washburn on Real Property, 60, 61; Bouvier's Law Dict., tit. Accretion; Woolrych on Waters, lateral p. 29.

Fleta says: "We acquire a right to things, according to the law of nations, by accession. That which a stream has added to our land by alluvion, for instance, belongs to us by virtue of the same law": Fleta's Com. Juris. Aug., lib. 3, c. 2, sec. 6.

Does the testimony in this case show that the gravel bar is alluvion added to the land of the appellees by accretion?

We think not. On the contrary, the evidence shows that the gravel bar is a part of the bed of White River, within the above definition.

Reversed and remanded.

Waters — What is a Navigable Watercourse. — A watercourse is navigable when it is capable of being actually used for the purposes of navigation: *Fulmer* v. *Williams*, 122 Pa. St. 191; 9 Am. St. Rep. 88, and note 94, 95; *Nutter* v. *Gallagher*, 19 Or. 375. And it need not be navigable throughout the entire year: *Morrison* v. *Coleman*, 87 Ala. 655. The common law making the ebb and flow of the tide the controlling element in determining the navigability of waters does not hold good in this country: *Roberts* v. *Baumgarten*, 110 N. Y. 380; yet rivers above tide-water are *prima facie* non-navigable: *Sipsey River N. Co.* v. *Georgia P. R. R. Co.*, 87 Ala. 154. In *Cardwell* v. *Sacramento County*, 79 Cal. 347, the American River was held to be not navigable, inasmuch as it was dropped from the list of rivers declared by the legislature as navigable, and was not in fact navigable for any purposes during the ordinary stages of water. See *McLaughlin* v. *Hope Mfg. Co.*, 103 N. C. 100, for a classification of watercourses with respect to navigability in that state. Compare *Fuller* v. *Dauphin*, 124 Ill. 542; 7 Am. St. Rep. 388. The burden of proving navigability is upon the party alleging it, when the stream is not one which is navigable at common law: *Sipsey River N. Co.* v. *Georgia P. R. R. Co.*, 87 Ala. 154; *Morrison* v. *Coleman*, 87 Ala. 655; and the question of such navigability is for the jury: *Olive* v. *State*, 86 Ala. 88.

Waters — Title of Riparian Owners of Lands Bounded on Navigable Waters. — The state owns lands covered by navigable waters: *Roberts* v. *Baumgarten*, 110 N. Y. 380; *Fulmer* v. *Williams*, 122 Pa. St. 191; 9 Am. St. Rep. 88; *Sewall* v. *Boston etc. Co.*, 147 Mass. 61; *Bassett* v. *Franklin*, 15 R. I. 572. A grant bounded upon a navigable stream extends to the low-water mark: *Fulmer* v. *Williams*, 122 Pa. St. 191; 9 Am. St. Rep. 88; *Palmer* v. *Farrell*, 129 Pa. St. 162; but in *People* v. *Jones*, 112 N. Y. 597, the rule is laid down that the line of riparian ownership extends only to the high-water mark. A state does not surrender the control of its navigable waters by granting its beach or water-lot property: *Payne* v. *English*, 79 Cal. 540.

As to what title a grantee acquires under a conveyance describing property as bounded on navigable waters, see *Meyers* v. *Mathis*, 42 La. Ann. 471; 21 Am. St. Rep. 385, and note. Conveyances describing lands bounded upon a meandered body of navigable water convey such land up to the waters, even though the meandered line mentioned in the conveyance is not identical with the actual line of the body of water: *Iverson* v. *City of Waseca*, 44 Minn. 247; *Ladd* v. *Osborne*, 79 Iowa, 93; unless the grantor evidently intended to limit his conveyance: *Palmer* v. *Farrell*, 129 Pa. St. 162; for he may make whatever reservations to himself that he may see fit: *Turner* v. *Holland*, 65 Mich. 453. And this rule applies as well to lands bounded by small inland lakes as to lands upon navigable waters: *Clute* v. *Fisher*, 65 Mich. 48.

An act declaring a navigable river non-navigable does not invest the riparian owners with title to the middle of the stream, and they continue to hold only to high-water mark: *Steele* v. *Sanches*, 72 Iowa, 65; *Chicago etc. R'y Co.* v. *Porter*, 72 Iowa, 426.

The waters of lakes cannot be legally drawn down below their natural low-

water mark, unless by legislative permission: *Fernald* v. *Knox Woolen Co.*, 82 Me. 48. So a deed purporting to convey the soil beyond the low-water mark of a stream or lake that is navigable is inoperative and void, for such soil belongs only to the state: *Lake Superior L. Co.* v. *Emerson*, 38 Minn. 406; 8 Am. St. Rep. 679.

WATERS — DEFINITIONS. — For the meaning of the words "sea-shore" and "high seas," see *Morgan* v. *Nagodish*, 40 La. Ann. 246.

ACCRETION — ALLUVION — DEFINITIONS. — For definitions of the terms "accretion" and "alluvion," see note to *Lovingston* v. *St. Clair County*, 16 Am. Rep. 526, 527; note to *Hagan* v. *Campbell*, 33 Am. Dec. 276. Land formed by natural accretion upon the bank of a navigable stream belongs to the riparian owner of the bank, even though the accretion has so materially reduced the size of the stream as to render it non-navigable: *Fillmore* v. *Jennings*, 78 Cal. 634. Where a railway company has built its embankment into the bed of a river, below the high-water mark, and such mark is changed to the farther side of the embankment, the riparian owner cannot claim to the last high-water mark, claiming title by accretion: *Chicago etc. R'y Co.* v. *Porter*, 72 Iowa, 426. Nor can a riparian owner claim title to land by accretion, when the accretion occurred before he obtained his grant from the government, and the government had already sold the land claimed as accretion to other parties: *Bissell* v. *Fletcher*, 27 Neb. 582. A riparian owner, upon conveying realty upon navigable waters, may reserve to himself the right to any subsequent accretions: *People* v. *Jones*, 112 N. Y. 597.

ROBINSON *v.* BASKINS.

[58 ARKANSAS, 330.]

INDEMNITOR, JUDGMENT AGAINST PRINCIPAL NOT CONCLUSIVE AGAINST, WHEN. — Where a constable sues upon a bond given to indemnify him for the seizure of property under execution, a judgment against him for damages for making such seizure, rendered in a suit of which the indemnitors had no notice, is only *prima facie* evidence against them, and they may defend by showing that the constable had a good defense to the action against him.

ACTION on an indemnity bond. The opinion states the case.

Walter D. Jacoway, for the appellants.

Davis and Bullock, for the appellees.

HUGHES, J. Appellees sued appellants upon a bond of indemnity, given by them to W. L. Baskins, as special constable, under section 3021 of Mansfield's Digest, to indemnify them against the damages they might sustain in consequence of the seizure or sale of the property of the judgment debtor of appellants, who was one J. B. McGhee, against whom they had obtained judgment before a justice of the peace of Perry County, Arkansas, and upon which execution had been issued

and placed in the hands of said special constable. The constable sold the property at public sale, and at the sale one Deshazer claimed the property and forbade the sale. Deshazer brought suit in trespass against the constable and the other appellees, purchasers of the property at the sale, and recovered fifty dollars and costs as damages.

In this suit against the appellants (the indemnitors), they offered to prove by witnesses that J. B. McGhee, against whom appellants had obtained judgment, was the sole owner of the property sold by the constable, and that Deshazer never owned or had any interest in it, and that McGhee was not indebted to Deshazer. And they also offered to prove that at the time of the judgment against McGhee, he was absent from Perry County, where he resided, and that upon his return, Deshazer admitted that his claim to the property was groundless, and offered to repay McGhee every cent he had received for the same. This testimony was excluded upon the ground that appellants were concluded by the judgment against appellees in favor of Deshazer, which appellees had been permitted to read in evidence over the objection of appellees. There was judgment for appellees, and an appeal to this court.

Were appellants estopped and concluded by the judgment against appellees in favor of Deshazer? They were not parties to the suit in which the judgment was rendered, and there is no evidence that they had notice to it. As a rule, a judgment binds only parties and privies: Freeman on Judgments, secs. 154–161. *Res inter alios acta alteri nocere non debet:* Broom's Legal Maxims, 735. Mr. Freeman, in his work on judgments (sec. 184), says: "Covenants to indemnify against the consequences of a suit are of two classes: 1. Where the covenantor expressly makes his liability depend on the event of a litigation to which he is not a party, and stipulates to abide the result; and 2. Where the covenant is one of general indemnity merely, against claims or suits. In cases of the first class the judgment is conclusive evidence against the indemnitor, although he was not a party and had no notice, for its recovery is the event against which he covenanted. In those of the second class, the judgment is *prima facie* evidence only against the indemnitor, and he may be let in to show that the principal had a good defense to the claim." The indemnitor can in either class show collusion, for the purpose of charging him. See also the cases cited in notes

2 and 3 to sections 184 and 181, Freeman on Judgments. See also Wells on *Res Adjudicata and Stare Decisis*, sec. 196; *Bridgeport Ins. Co.* v. *Wilson*, 34 N. Y. 280, and cases cited; *Boyd* v. *Whitfield*, 19 Ark. 447; *Smith* v. *Corege*, 53 Ark. 295.

The appellants, having had no notice of the suit by Deshazer against appellees, are not concluded by the judgment in said suit, and should have been let in to make their defense. The judgment was only *prima facie* evidence and not conclusive against them.

Reversed, and the cause remanded.

INDEMNITORS, HOW FAR BOUND BY JUDGMENTS AGAINST THEIR PRINCIPALS. — In the note to *Charles* v. *Hoskins*, 83 Am. Dec. 380–390, the question when a judgment is conclusive against the surety of the defendant, or against one who is liable over to the defendant, is discussed at length. In that note attention was called to the distinction between a mere surety and one who enters into a contract of indemnity. In this note it is proposed to consider the question to what extent those who have entered into contracts of indemnity are bound by judgments rendered against those whom they have contracted to indemnify.

JUDGMENTS, WHEN CONCLUSIVE UPON INDEMNITORS. — A person may, of course, contract to be answerable to another upon such lawful conditions as he sees fit. If a person enters into a contract of indemnity whereby he agrees to become responsible for the result of a litigation, or if, by operation of law, such a responsibility is cast upon him without any agreement, he will, in the absence of fraud or collusion, be conclusively bound by the judgment rendered, whether he had notice of the action in which it was entered or not: Freeman on Judgments, 4th ed., sec. 176; Wells on Res Adjudicata, sec. 196; *Riddle* v. *Baker*, 13 Cal. 295; *Pico* v. *Webster*, 14 Cal. 202; 73 Am. Dec. 647; *Collins* v. *Mitchell*, 5 Fla. 364; *Davis* v. *Smith*, 79 Me. 351; *Pasewalk* v. *Bollman*, Sup. Ct. Neb., May, 1890; *Chace* v. *Hinman*, 8 Wend. 452; 24 Am. Dec. 39; *Douglass* v. *Howland*, 24 Wend. 36; *Rapelye* v. *Prince*, 4 Hill, 119; 40 Am. Dec. 267; *Fay* v. *Ames*, 44 Barb. 327; *Gilbert* v. *Wiman*, 1 N. Y. 550; 49 Am. Dec. 359; *Methodist Churches* v. *Barker*, 18 N. Y. 463; *Bridgeport F. & M. Ins. Co.* v. *Wilson*, 34 N. Y. 275; *Conner* v. *Reeves*, 103 N. Y. 527; affirming 35 Hun, 507; *Jaynes* v. *Platt*, 47 Ohio St. 262; *Patton* v. *Caldwell*, 1 Dall. 419; *Lincoln* v. *Blanchard*, 17 Vt. 464. In delivering the opinion of the court in *Conner* v. *Reeves*, 103 N. Y. 530, Andrews, J., said: "The covenantor, in an action on a covenant of general indemnity against judgments, is concluded by the judgment recovered against the covenantee from questioning the existence or extent of the covenantee's liability in the action in which it was rendered. The recovery of a judgment is the event against which he covenanted, and it would contravene the manifest intention and purpose of the indemnity to make the right of the covenantee to maintain an action on the covenant to depend upon the result of the retrial of an issue which, as against the covenantee, had been conclusively determined in the former action, 'always, however, saving the right, as the law must in every case where the suit is between third persons, to contest the proceeding on the ground of fraudulent collusion, for the purpose of charging the surety.'" Norval, J., in delivering the opinion of the court in *Pasewalk* v. *Bollman*, Sup. Ct. Neb., May, 1890, said: "It will be observed that the bond on which

this action is based indemnifies the obligee 'from all harm, trouble, damages, costs, suits, actions, judgments, and executions that shall or may arise, come, or be brought against him.' The sureties undertook to save the officer harmless from any judgment that might be recovered against him by reason of the levying of the executions. It was no part of the agreement that the sureties should be notified of the pendency of the action. If the sureties desired notice of the proceedings to obtain the judgment, they should have stipulated for it in the bond of indemnity; not having done so, the failure to receive such notice does not affect their liability. They agreed absolutely to be bound by any judgment rendered against the officer." And Spear, J., in delivering the opinion of the court in *Jaynes* v. *Platt*, 47 Ohio St. 273, discussing the difference between the obligation in official bonds and that in bonds of indemnity against judgments, said: "In general, the obligation in official bonds is, that the surety will be responsible in case the officer fails to faithfully discharge the duties of the office. The question in issue in an action on the bond against the sureties is, Has there been dereliction of official duty within the meaning of the bond? and has the party complaining been damnified? In this class of cases the question is different. It is: Did the plaintiff recover judgment, and for what amount? and did the defendant satisfy it? Proof that a judgment was rendered for the plaintiff in attachment which the defendant has not satisfied shows a breach of the bond. And of such judgment it would seem that the record itself is not only the best, but the only, evidence, and until impeached for fraud, collusion, or manifest mistake, ought to be held conclusive." In that case, the judgment in question was rendered in an action on a bond given to supersede an attachment. The obligation of the bond was: "We bind ourselves to the said plaintiff in the sum of eleven thousand dollars that the said defendant shall perform the judgment of the court in this action." In *Conner* v. *Reeves*, 103 N. Y. 527, it was held that where the judgment was taken by consent of the obligee, while he is not excluded from the protection of the indemnity, the judgment is presumptive evidence only against the sureties, and they are at liberty to show that it was not founded upon any legal liability, or that it exceeds such liability; but that, in the absence of any proof impeaching the fairness or justice of the claim, or tending to show that the judgment exceeded the legal liability of the obligee, he is entitled to recover the amount of the judgment in an action against the sureties on the bond. In that case, Andrews, J., who delivered the opinion, while considering that it would be too strict an interpretation of the contract to hold, as matter of law, that the conditions of the bond only covered judgments obtained upon hostile and adverse litigation, and that no discretion was left to the sheriff to consent to a judgment, although he believed that by so doing money would be saved to the parties ultimately liable, said: "But, at the same time, to hold that a judgment entered by consent of the parties, and without notice to or approval by the sureties, is, in the absence of proof of fraud or collusion, conclusive against them would open the door to the perpetration of secret frauds, and subject sureties to a most hazardous responsibility, and to the discretion and judgment of a third person, which might seriously imperil them." A covenant of indemnity against the recovery of a judgment is broken the moment judgment is recovered against the covenantee, and a cause of action thereon is complete for damages, which are measured by the amount of the judgment.

JUDGMENT CONCLUSIVE WHEN INDEMNITOR NOTIFIED OF SUIT. — In the case of a general indemnity against claims and suits, a judgment against the

covenantee will be held conclusive against the indemnitor, where notice has been given to the latter to come in and defend the suit in which it was rendered, and an opportunity was given him to do so: *Smith* v. *Corey*, 53 Ark. 295; *Dutil* v. *Pacheco*, 21 Cal. 438; 82 Am. Dec. 749; *Inhabitants of Veazie* v. *Penobscot R. R. Co.*, 49 Me. 119; *Davis* v. *Smith*, 79 Me. 351; *City of Boston* v. *Worthington*, 10 Gray, 496; 71 Am. Dec. 678; *Train* v. *Gold*, 5 Pick. 379; *Mackey* v. *Fisher*, 36 Minn. 348; *Littleton* v. *Richardson*, 34 N. H. 179; 66 Am. Dec. 759; *Kip* v. *Brigham*, 6 Johns. 158; *Aberdeen* v. *Blackmar*, 6 Hill, 324; *City of Chicago* v. *Robbins*, 2 Black, 423. In such cases, if the party duly notified has the right to appear and defend the action, he is no longer regarded as a stranger to the action, and he will be as much bound by the judgment as if he had been the real and nominal party upon the record. In *Mackey* v. *Fisher*, 36 Minn. 348, Berry, J., who delivered the opinion of the court, said: "The judgment, being thus admissible, might properly be found conclusive upon the defendants, because it might, upon the evidence, properly be found that they had notice of the action in which it was rendered, and that they had an unobstructed opportunity to defend it; that they had promised and assumed to defend it; that it failed to be defended because they failed to keep their promise." In that case, the defendants contracted in writing to erect a building for the plaintiffs, and to be responsible for any loss or injury to person or property occasioned by their negligence in and about the erection of the building. One Moran was injured through the negligence of the defendants, and brought suit against the plaintiffs and the defendants together. The defendants interposed an answer, but the plaintiffs, having failed to answer within the time allowed by law, applied for leave to answer after that time, but their application was denied. Moran thereupon dismissed as to the defendants, and the default of the plaintiffs having been entered, took judgment against them, and this judgment they were compelled to pay. In the action brought by them to recover the amount of this judgment from the defendants, the evidence tended to show that after Moran's action was brought, the defendants promised and assumed "to take care of it," and to put in an answer for all the parties, and there was no evidence to show that there was any obstacle to prevent them from so doing. It was held that the jury were at liberty to find that the defendants were concluded by the judgment obtained by Moran. The California Code of Civil Procedure, section 1055, provides that "if an action be brought against a sheriff for an act done by virtue of his office, and he give written notice thereof to the sureties on any bond of indemnity received by him, the judgment recovered therein shall be conclusive evidence of his right to recover against such sureties." In *Dutil* v. *Pacheco*, 21 Cal. 438, 82 Am. Dec. 749, it was held that this provision is founded upon the principle that the action is, in such circumstances, in substance, against the indemnifier, and that he cannot therefore maintain a bill in equity to set aside the judgment obtained therein. In *Bartlett* v. *Campbell*, 1 Wend. 50, it was decided that in an action against one on a joint and several promise of indemnity by two, notice to one is notice to both. In *Tracy* v. *Goodwin*, 5 Allen, 409, it was decided that a judgment, recovered without fraud or collusion, against a constable for a wrongful attachment is conclusive against him and his sureties, upon a bond executed by them jointly and severally. Chapman, J., delivering the opinion in that case, said: "The sureties have so made their bond that a joint judgment must be rendered in this suit against all the defendants." In *Westervelt* v. *Smith*, 2 Duer, 449, it was held that in an action on a bond given to indemnify a sheriff for damages sustained by him by reason of the

defaults of his deputy, a judgment against the sheriff is at least *prima facie* evidence against the surety sued, where the deputy had notice of the suit in which it was rendered, although the surety himself had no notice. And in *Fay* v. *Ames*, 44 Barb. 327, it was decided in a similar case that the judgment was conclusive against the sureties, and that they were not at liberty to litigate over again the liability of the sheriff in the former action, nor to prove facts in exoneration of their principal which the latter set up as a defense in the former suit. In that case it was held that where parties join in a bond of indemnity as principal and sureties, they are in privity of contract with each other, and are to be regarded and treated *quoad* the contract, and the rights and liabilities connected with and growing out of it, as one person; and in such case notice to one is notice to all. *Fay* v. *Ames*, 44 Barb. 327, seems, however, to have been indirectly overruled in the subsequent case of *Thomas* v. *Hubbell*, 35 N. Y. 120, where it was held that the sureties on a deputy sheriff's bond are not concluded by a recovery against the sheriff, where they had no opportunity to appear and defend.

JUDGMENT PRIMA FACIE EVIDENCE ONLY, WHERE NOTICE OF SUIT IS NOT GIVEN. — Where a person enters into a covenant of general indemnity merely against claims and suits, a want of notice to him of the suit brought against his principal does not go to the cause of action, but the judgment rendered therein is *prima facie* evidence only in an action against such indemnitor, and he may be let in to show that the principal had a good defense which he neglected to make: Wells on Res Adjudicata, sec. 196; *Duffield* v. *Scott*, 3 Term Rep. 374; *Smith* v. *Compton*, 3 Barn. & Adol. 407; *Lyon* v. *Northrup*, 17 Iowa, 314; *Train* v. *Gold*, 5 Pick. 379; *Stewart* v. *Thomas*, 45 Mo. 42; *Lee* v. *Clark*, 1 Hill, 56; *Thomas* v. *Hubbell*, 15 N. Y. 405; 69 Am. Dec. 619; *Bridgeport F. & M. Ins. Co.* v. *Wilson*, 34 N. Y. 275; *State* v. *Colerick*, 3 Ohio, 487; *Hazzard* v. *Nagle*, 40 Pa. St. 178; *Stephens* v. *Shafer*, 48 Wis. 54; 33 Am. Rep. 793. The question how far a judgment against an executor or administrator concludes his sureties is discussed in the note to *Heard* v. *Lodge*, 32 Am. Dec. 202–204.

CHASE *v.* CARTRIGHT.

[53 ARKANSAS, 356.]

DEVISE TO EXECUTORS PASSES TITLE IN FEE WHEN. — Where a testator by his will gives his property, both real and personal, to his executors, with power to dispose of it to the best of their judgment, directs them to pay certain large legacies, and devises over the estate then remaining, the executors hold the legal title to the property in fee, in trust, for the *cestuis que trustent*.

EXECUTOR NOT ESTOPPED BY HIS OWN VOID DEED. — An executor is not estopped by his own void deed of land from suing to dispossess persons claiming under it.

STATUTE OF LIMITATIONS, CESTUI QUE TRUST, WHEN BARRED BY. — Where a trustee holding the legal title to land in fee is barred by the statute of limitations, all the *cestuis que trustent* are barred, whether they are entitled in possession or in remainder, vested or contingent, and whether they are *sui juris* or under disability.

VENDOR'S LIEN EXPIRES WHEN DEBT IS BARRED. — The lien of a vendor of land reserved in the face of the deed expires when the debt is barred by the statute of limitations.

THE opinion states the case.

W. M. Randolph, for the appellants.

W. G. Weatherford, for the appellees.

HEMINGWAY, J. The appellants, as residuary devisees and legatees under the will of Daniel Hughes, deceased, brought this suit.

Daniel Hughes died resident in Shelby County, Tennessee, on the 10th of February, 1862, seised of the land in controversy. By last will, which was duly admitted to probate in that county in March, 1862, he disposed of his estate as follows: "All my real and personal estate I give, in trust, to my executors for the purpose of disposing of it to the best of their judgment, for the support and education of my two children, the children of Eliza Darragh, and the support of the said Eliza. For that purpose they are to give the said Eliza one thousand dollars a year until the eldest child is nine years old (it is now nearly two), and if either of the children should die before then, there shall be no change made as to the amount of a thousand dollars a year. Should both children die before they are of age, Eliza Darragh is to receive out of my estate five hundred dollars a year during her life. Should the net income of my estate be two thousand dollars a year after paying the legacies hereinafter mentioned, I wish my father to have five hundred dollars a year of this income during his life, and if my mother outlives him, she is to receive it after his death. The residue is to be invested in Memphis City bonds until the children, or the survivor of them, is sent to college. I desire my executors to exercise their best judgment in the selecting of a suitable school, and to be liberal, if the means are in their hands to procure them a good education. But my executors are requested to check and stop the supplies if they should be satisfied there is extravagance by the children, and to pay no bills of theirs not authorized by the executors before contracted by the child or children; I wish the children plenty, but not waste." And the following: "In the event of the death of both of my children, mentioned above, before they have a child or children to inherit to them, I give to Elizabeth Higgins and Mary Ann Hughes

all my estate remaining, except the annuities as above mentioned." And the following: "I appoint James Hughes (my father), William Park, and John Cannavan the executors of my will. I know it is an unpleasant task, but I would render either of them any service in my power. They are to be required to give no security, for they will not abuse their trust."

Of the parties named as executors, James Hughes never qualified, and William Park, who qualified, resigned in 1865. John Cannavan, the remaining executor, died in 1877, without, as it appears, having resigned or concluded his trust.

The will was duly admitted to probate in Crittenden County, this state, on the second day of March, 1866. There seems to have been at different times a scrambling administration of the estate, conducted by various parties under appointment from the probate court in that county; but, in the view of the case taken by us, it is unnecessary to consider the legal aspect or effect of the administration in this state. It was characterized by unseemly conduct, which cannot be contemplated without condemnation.

On the 16th of October, 1866, John Cannavan, the only acting executor, sold and conveyed to Asa Hodges the land in controversy for $1,280 in cash, and $1,280 payable twelve months after the date thereof, to secure which a lien was expressly reserved in the face of the deed. The appellees claim title by purchase from Hodges.

Lizzie Darragh, one of the children named in the will, died before the testator; Eliza Darragh, her mother, died in 1865; Daniel Darragh, the second child, left his residence in Memphis about 1870, and was not afterwards heard from by his relatives or friends, and is presumed to be dead. He was unmarried, and died without a child to inherit from him. The appellant, Mary Ann Winters, was a married woman when Daniel Darragh died, and so continued to the bringing of this suit.

The appellants seek, — 1. To recover the land conveyed by Cannavan, as executor, to Hodges; but in the event that they are not entitled to that relief, they seek, — 2. To recover the sum of $1,280, with interest, being the unpaid installment of purchase-money secured by him on the land, in the deed above mentioned. In support of their claim they say, — 1. That the will did not confer a power of sale on the executors; 2. That the power conferred could not be executed by one only of the

executors; and 3. That a sale was authorized only upon stated conditions, which did not exist when it was made.

The appellees insist,—1. That a power of sale was conferred by the will; 2. That it was duly executed; 3. That they purchased in good faith, and entered immediately into possession of the land; that they had continually held it for seventeen years, claiming title against the world; and that they had good title by limitation; 4. That the installment of purchase-money was paid; and 5. That it was barred by limitation. The proof sustained their contention as to their possession of the land. There was trial by the court, and judgment for the defendant.

It is insisted that the judgment is wrong, and should be reversed for many reasons pressed upon our attention. In the view we have taken, it is essential for us to consider only the defense of limitation and such other matters as are involved in its correct determination.

The appellants contend that, until the death of Daniel Darragh, they had no right in possession, but only in remainder; that they were not entitled to bring any suit either for the land or the purchase-money during his life; that the statute was not set in motion against them until he died, and that they brought this suit in apt time thereafter. If mistaken in that contention, their claim to the land must fail against the plea of limitation. Is it correct? Our answer must depend upon the construction of the will, for it makes a great difference whether the executors are held to have acquired the legal title for life or in fee.

The language of the will leaves no room for doubt as to the wish of the testator in that regard. His purpose as to the disposition of his estate is clearly and concisely stated in the first clause of the will. It gives all his real and personal estate, in trust, to his executors, for the purpose of disposing of it to the best of their judgment, for the support and education of his two children and for the support of Eliza Darragh. The executors are directed to pay certain annuities and money bequests, the latter aggregating about ten thousand dollars. If the two children die without leaving a child or children who could inherit, the estate remaining is devised over to the appellants. The language of the grant to the executors in its ordinary acceptation would be held to convey an estate in fee: 1 Sugden on Powers, 129, 130. There is nothing to limit the estate passed to a life estate only, as in

the case of *Patty* v. *Goolsby*, 51 Ark. 61. That the natural import of the terms of the grant correctly reflect the wish of the testator gains support from the power given them to dispose of realty and personalty alike in their best judgment, from the directions to pay out large sums of money, to supply which no other means are indicated, and from the devise over of all his estate remaining.

The phrase "estate remaining" was evidently not used in the legal sense of a remainder, but to cover what was left after special directions were executed. The testator intended his executors to take absolutely the legal title to all his property to pay off the special bequests, — to provide as he directed for Eliza Darragh and her children, — and to those ends, to sell or otherwise dispose of his property as their judgment might direct. Whatever was not sold or consumed in paying the bequests and the matured annuities, the trustees were to hold for the purposes indicated; and if both children died without a child to inherit, the estate remaining was to go to the appellants, subject to the payment of the future annuities to Eliza and his father. The grant to the executors and the power to sell are co-extensive, and neither can be restricted to a life estate or an estate less than a fee, without importing into the terms of the grant a meaning they do not express. As we have seen, there is no purpose indicated that requires such a construction, but on the contrary, the natural import of the terms consists with the general purpose of the testator as indicated in the will.

The executors had no beneficial interests in the property; but, holding the legal title to the fee in trust, they were trustees for all persons who had equitable interests carved out of the fee, whether in possession or in remainder. If the conveyance by Cannavan was void, and the grantees entered under it, a right then accrued to the executors to dispossess them, and being trustees of an express trust, they could have sued in their own names. If the deed was inoperative for want of legal authority to make it, Cannavan was not estopped to sue to dispossess persons claiming under it, as was expressly ruled by the supreme court of the United States in the case of *Meeks* v. *Olpherts*, 100 U. S. 564; Bigelow on Estoppel, 5th ed., 349; *Pells* v. *Webquish*, 129 Mass. 469; *Mason* v. *Mason*, 140 Mass. 63; *James* v. *Wilder*, 25 Minn. 305.

Seven years' adverse possession was sufficient to bar the right of the trustees, they being under no disability; but when-

ever the right of action in the trustees is barred by limitation, the right of *cestuis que trust* thus represented is also barred: Hill on Trustees, 403; Wood on Limitations, sec. 208; *Smilie* v. *Biffle*, 2 Pa. St. 52; 44 Am. Dec. 156; *Meeks* v. *Olpherts*, 100 U. S. 564; *Trimble* v. *Woodhead*, 102 U. S. 647; *Molton* v. *Henderson*, 62 Ala. 426; *Wingfield* v. *Virgin*, 51 Ga. 139; *Clayton* v. *Cagle*, 97 N. C. 300.

This rule was applied by the supreme court of the United States in the case of *Meeks* v. *Olpherts*, 100 U. S. 564, against the right of *cestui que trust* in a vested remainder. It has been applied similarly by other courts, and there are now no doubts that it is sound in principle and accepted by the courts.

The question of the application of the rule to claims of contingent remainders seems to have arisen in but few American cases; but it has been held by the courts of last resort in two states that when the trustee is barred, the *cestui que trust* holding a contingent remainder is also barred: *Edwards* v. *Woolfolk*, 17 B. Mon. 876; *Waring* v. *Cheraw and Darlington R. R. Co.*, 16 S. C. 416.

In our investigation we have found no case in which a contrary rule was favored; and as the trustee represents alike all *cestuis que trust*, whether entitled in possession or in remainder, vested or contingent, we think the same rule should apply to the claim of each of them in determining the effect upon it of the bar of the trustee's right by limitation.

The disability of the *cestui que trust* is immaterial, if the trustee is under none: Hill on Trustees, 504, and cases above cited.

This court has repeatedly held that the bar by limitation of the right of the life tenant does not affect the right of the remainderman, against whom limitation will not run until his right of possession accrues. Those were cases in which the tenant for life and the remainderman each held his estate at law, and where no right of action accrued in behalf of the remainderman until the estate for life determined. But in this case, as we have seen, the right of action accrued to the trustees for the benefit of all beneficially interested as soon as the adverse possession began, and if they failed to institute suit, the *cestuis que trust* might have resorted to equity for the protection of their interests.

The rule does not apply to the claims of the *cestuis que trust* against the trustee or against those who purchase trust property from the trustee in fraud of the trust.

The lien reserved in the face of the deed is, as contended, an equitable mortgage; but by its terms it only charges a lien on the land in favor of the creditor, and does not, like the mortgage in law, invest the creditor with title to the land to be held as security. In the case of *Stephens* v. *Shannon*, 43 Ark. 464, this court held that the lien so reserved was but an incident to the debt thereby secured, and that the lien expired when the debt was barred by limitation.

It follows that the right to recover the land, and also the right to foreclose the lien reserved in the deed, were barred by limitation, and that the judgment below was correct.

Affirmed.

DEVISE TO EXECUTOR, CONSTRUCTION OF. — A testator having in his will made the provision that his executor should have the care and custody of his estate, and should pay the legacies therein mentioned, paying the net income of the balance to certain persons at stated intervals, the executor takes the fee to hold it in trust to pay the income as directed: *Traphagen* v. *Levy*, 45 N. J. Eq. 448.

EXECUTORS AND ADMINISTRATORS — ESTOPPEL. — The grantee in a void quitclaim deed executed by an executor cannot take any title by way of estoppel against such executor: *Price* v. *King*, 44 Kan. 639.

LIMITATIONS OF ACTIONS — TRUSTEE AND CESTUI QUE TRUST. — Where the legal title of land is vested in a trustee for the benefit of a *cestui que trust*, the statute of limitations will run against the former; and when a complete bar as to him, the *cestui que trust* will be barred: *Collins* v. *McCarty*, 68 Tex. 150; 2 Am. St. Rep. 475, and note; *Barclay* v. *Goodloe*, 83 Ky. 493; for when the legal estate is barred, so is the equitable estate: *East Rome Town Co.* v. *Cothran*, 81 Ga. 359. But the statute of limitations will never run in favor of the trustee as against the *cestui que trust* until the former repudiates the trust, and notice of such repudiation is brought home to the *cestui que trust: Cooper* v. *Lee*, 75 Tex. 114; *Wren* v. *Followell*, 52 Ark. 76; *Dyer* v. *Waters*, 46 N. J. Eq. 484; *McClure* v. *Colyear*, 80 Cal. 378.

VENDOR AND PURCHASER — EXPIRATION OF VENDOR'S LIEN. — A vendor's equitable lien for unpaid purchase-money of land is not lost because the statute of limitations has barred the action upon notes given therefor: *Bixell* v. *Nix*, 60 Ala. 281; 31 Am. Rep. 38; and compare cases cited in the note to the same case, 41, 42. The vendor's right to his vendor's lien, where he has not actually parted with title, cannot be affected by the lapse of time short of that requisite to raise the presumption of payment: *Hanna* v. *Wilson*, 3 Gratt. 243; 46 Am. Dec. 190. Though an action at law to recover purchase price may be barred, the equitable lien of a vendor is not barred by any time insufficient to raise the presumption of payment: *Tunstall* v. *Withers*, 86 Va. 892; compare *Relfe* v. *Relfe*, 34 Ala. 500; 73 Am. Dec. 467, and note; *Singleton* v. *McQuerry*, 85 Ky. 41.

VAN BUREN v. WELLS. VAN BUREN v. WRIGHT. CASSIDY v. TEXARKANA.

[53 ARKANSAS, 268.]

MUNICIPAL CORPORATION MAY MAKE PENAL ACT WHICH IS ALREADY OFFENSE AGAINST STATE. — A municipal corporation has power to make penal an act which has already been made so by a state statute; and when this is done, such act becomes a separate offense against the state and the municipality. In that case, the penalty imposed by the municipality is superadded to that fixed by the general law on account of the additional wrong done to it, and the wrong-doer is not twice punished for the same offense.

ORDINANCES, POWER OF MUNICIPAL CORPORATIONS TO PASS. — Under statutes expressly giving to municipal corporations "power to make and publish such by-laws and ordinances, not inconsistent with the laws of the state, as to them shall seem necessary to provide for the safety, preserve the health, promote the prosperity, and improve the morals, order, comfort, and convenience of such corporations and the inhabitants thereof," ordinances punishing disturbances of the peace, the carrying of concealed weapons, and the keeping open of saloons on Sunday are a proper exercise of the power conferred, and are therefore valid.

PUBLICATION OF MUNICIPAL ORDINANCE, BURDEN OF PROOF OF. — In a prosecution for the violation of a municipal ordinance, the burden is on the defendant to prove that the ordinance was not published in the manner prescribed by the statute.

Nimrod Turman, for the appellant in the first two cases.

Wells, pro se.

Scott and Jones, for the appellant Cassidy.

BATTLE, J. In the first case, the facts are as follows: Wells was accused and convicted, before a justice of the peace of Crawford County, of carrying a pocket-pistol concealed about his person within the corporate limits of the town of Van Buren, in said county, and in this state. At the time this offense was committed, there was in full force and effect an ordinance of the town of Van Buren prohibiting the carrying of such pistols, and imposing a fine on every person violating the same. After conviction in the justice's court, he was accused, before the mayor of the town, of violating this ordinance, by the same act of which he was convicted, and for such violation was arrested, and carried before the mayor. In the mayor's court he pleaded his former conviction, and was tried and convicted. He appealed to the circuit court, where his plea of former conviction was sustained, and he was discharged; and the plaintiff appealed to this court.

In the second case, Frank Wright was accused and convicted

in the court of the mayor of the town of Van Buren of a violation of an ordinance of said town by "disturbing the peace by fighting and attempting to fight, and by boisterous and obstreperous conduct and carriage, and by using profane language." He appealed to the circuit court, and there he demurred to the charge, because,—1. The records of the town of Van Buren do not show that the ordinance violated was published as required by law; and 2. Because it imposes a fine on persons for acts declared and made criminal by the statute of the state. The court sustained the demurrer and discharged the defendant, and plaintiff appealed.

In the last case, Mike Cassidy was accused and convicted before the mayor of the city of Texarkana, in Miller County, in this state, of keeping his saloon open on the sabbath, and retailing wines and liquors on that day, in violation of a city ordinance. He appealed to the circuit court, was again convicted, and then appealed to this court.

The acts of which the defendants in the first and third cases were accused, and a part of those with which the defendant in the second case was charged, are made penal by the statutes of this state. It may be conceded that they were made criminal before any of the ordinances prohibiting them were passed. Did the town or city councils that enacted the ordinances have the authority to pass them? The only authority which can rightfully be claimed for their enactment is section 764 of Mansfield's Digest. This section provides: "Municipal corporations shall have power to make and publish, from time to time, by-laws or ordinances, not inconsistent with the laws of the state, for carrying into effect or discharging the power or duties conferred by the provisions of this act, and it is hereby made the duty of the municipal corporation to publish such by-laws and ordinances as shall be necessary to secure such corporations and their inhabitants against injuries by fire, thieves, robbers, burglars, and other persons violating the public peace; for the suppression of riots and gambling and indecent and disorderly conduct; for the punishment of all lewd and lascivious behavior in the streets and other places; and they shall have power to make and publish such by-laws and ordinances, not inconsistent with the laws of this state, as to them shall seem necessary to provide for the safety, preserve the health, promote the prosperity, and improve the morals, order, comfort, and convenience of such corporations and the inhabitants thereof." Its language is sufficiently comprehensive to

delegate the authority. But many courts have held that a municipal corporation can only pass ordinances punishing the same acts which are punishable under the general laws of the state, when expressly authorized to do so, and that no such authority will be presumed from a grant of power general in its nature. If this be true, it must be because the effect of such ordinances is to supersede the general laws upon the same subject. We cannot see any good reason why such authority, fitting and proper to be delegated to a municipal corporation, and plainly conferred in general terms, cannot be exercised by the municipality, unless it be because it is inconsistent with the general laws. That is the effect of the authorities which hold it cannot be. Many of them say that the effect of such ordinances, if enforced, would be to oust the state of jurisdiction, or make the same offense punishable twice, once by the state and once by the corporation, contrary to the constitution, and therefore they are invalid: *In re Sic*, 73 Cal. 142; *Jenkins* v. *Thomasville*, 35 Ga. 145; *Mayor* v. *Hussey*, 21 Ga. 80; 68 Am. Dec. 452; *Adams* v. *Albany*, 29 Ga. 56; *Vason* v. *Augusta*, 88 Ga. 542; *Reich* v. *State*, 53 Ga. 73; 21 Am. Rep. 265; *Foster* v. *Brown*, 55 Iowa, 686; *Washington* v. *Hammond*, 76 N. C. 33; *State* v. *Langston*, 88 N. C. 692; *State* v. *Brittain*, 89 N. C. 574; *State* v. *Keith*, 94 N. C. 933; *Ex parte Smith*, Hemp. 201; *Ex parte Bourgeois*, 60 Miss. 663; 45 Am. Rep. 420.

But we do not think the ordinances in question are invalid because they make offenses twice punishable. Municipal corporations "are bodies politic and corporate, vested with political and legislative powers for the local civil government and police regulations of the inhabitants of the particular districts included in the boundaries of the corporations." In some respects they are local governments, established by law to assist in the civil government of the country. They are founded in part upon the idea that the needs of the localities for which they are organized, "by reason of the density of population or other circumstances, are more extensive and urgent than those of the general public in the same particulars." Many acts are often far more injurious, while the temptation to do them is much greater, in such localities than in the state generally. When done in such localities they are not only wrongs to the public at large, but are additional wrongs to the corporations. To suppress them when it can be done, and when there is a failure to do so, to punish the guilty parties, in many cases form a part of the duties of such cor-

porations. Many of them can and ought to be made penal by the incorporated cities and towns, although they are already made so by the statute. It sometimes becomes necessary for them to do so in order to accomplish the objects of their organization. When made penal by the state and the city or town, each act becomes a separate offense against the state and the municipality. In that event, the penalty imposed by the city or town is superadded to that fixed by the general law, on account of the additional wrong done,— for the offense against the municipality. In such a case the wrong-doer would not be twice punished for the same offense.

In *Fox* v. *State of Ohio*, 5 How. 432, the supreme court of the United States held that the passing a counterfeit coin, which was punishable under the federal law, might be punished by the state as a crime, and that the same act was an offense against the federal government and against the state government. In delivering the opinion of the court in *Moore* v. *Illinois*, 14 How. 19, Mr. Justice Grier said: "An offense, in its legal signification, means the transgression of a law. A man may be compelled to make reparation in damages to the injured party, and be liable also to punishment for a breach of the public peace in consequence of the same act, and may be said, in common parlance, to be twice punished for the same offense. Every citizen of the United States is also a citizen of a state or territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. That either or both may (if they see fit) punish such an offender cannot be doubted. Yet it cannot be truly averred that the offender has been twice punished for the same offense; but only that by one act he has committed two offenses, for each of which he is justly punishable. He could not plead the punishment by one in bar to a conviction by the other."

Judge Cooley says: "Indeed, an act may be a penal offense under the laws of the state, and further penalties, under proper legislative authority, be imposed for its commission by municipal by-laws, and the enforcement of the one would not preclude the enforcement of the other." And further says: "Such is the clear weight of authority, though the decisions are not uniform": Cooley's Constitutional Limitations, 6th ed., p. 239, and cases cited; *Mayor* v. *Allaire*, 14 Ala. 400; *Hughes* v. *People*, 8 Col. 536; *Wragg* v. *Penn Township*, 94 Ill. 11; 34 Am. Rep. 199; *Ambrose* v. *State*, 6 Ind. 351; *Williams*

v. *Warsaw*, 60 Ind. 457; *Town of Bloomfield* v. *Trimble*, 54 Iowa, 399; 37 Am. Rep. 212; *Shafer* v. *Mumma*, 17 Md. 331; 79 Am. Dec. 656; *Wayne County* v. *Detroit*, 17 Mich. 399; *State* v. *Oleson*, 26 Minn. 507; *State* v. *Lee*, 29 Minn. 445; *St. Louis* v. *Bentz*, 11 Mo. 61; *St. Louis* v. *Cafferata*, 24 Mo. 94; *Linneus* v. *Dusky*, 19 Mo. App. 20; *City of Kansas* v. *Clark*, 68 Mo. 588; *Ex parte Hollwedell*, 74 Mo. 395; *St. Louis* v. *Vert*, 84 Mo. 204; *Brownville* v. *Cook*, 4 Neb. 101; *Howe* v. *Treasurer of Plainfield*, 37 N. J. L. 145; *State* v. *Bergman*, 6 Or. 341; *State* v. *Williams*, 11 S. C. 288; *Greenwood* v. *State*, 6 Baxt. 567; 32 Am. Rep. 539; *State* v. *Shelby*, 16 Lea, 240; *Hamilton* v. *State*, 3 Tex. App. 643; *McLaughlin* v. *Stephens*, 2 Cranch C. C. 148; *United States* v. *Wells*, 2 Cranch C. C. 45; *United States* v. *Holly*, 3 Cranch C. C. 656.

In Bishop on Statutory Crimes, it is said: "If the statute so authorizes, it is not apparent why a city corporation may not impose a special penalty for an act done against it, while the state imposes a penalty for the same act done against the state": Bishop on Statutory Crimes, 1st ed., sec. 23.

In *Brizzolari* v. *State*, 37 Ark. 364, the validity of an ordinance passed by the common council of the incorporated town of Fort Smith on the 23d of December, 1873, declaring that it shall be deemed a misdemeanor for any able-bodied person to be found within the limits of the corporation having no visible or apparent means of subsistence, and neglecting to apply himself to some honest calling, punishable by fine, came in question. It was insisted that this ordinance was abrogated by the adoption of the constitution of 1874. This court held that although the constitution of 1874 vested exclusive original jurisdiction in all matters relating to vagrants in the county courts, it did not repeal the ordinance; that the jurisdiction vested in the county courts as to vagrants extended "only to such matters of police regulations as are designed to prevent them from becoming burdensome to the county, or in their nature local or of special concern to the county," thereby virtually holding the doctrine laid down by Judge Cooley.

The ordinances in question are, therefore, not inconsistent with the general laws of the state upon the same subject; nor do they oust the state of any jurisdiction, if enforced, by making the same acts punishable, and are not invalid for these reasons. The only question, then, is, Did the municipal corporations that passed them have the power to do so? The

statutes expressly declare that they "shall have power to make and publish such by-laws and ordinances, not inconsistent with the laws of this state, as to them shall seem necessary to provide for the safety, preserve the health, promote the prosperity, and improve the morals, order, comfort, and convenience of such corporations and the inhabitants thereof." The only limitation upon this power is, the by-laws and ordinances must "not be inconsistent with the laws of the state." The ordinances in question do not fall within the limitation, and are wholesome provisions for the prosecution and improvement of the order and morals of the inhabitants for whose benefit they were designed, and a proper exercise of the power conferred. They are consequently valid: *Mayor* v. *Allaire*, 14 Ala. 400; *Bloomfield* v. *Trimble*, 54 Iowa, 399; 37 Am. Rep. 212; *St. Louis* v. *Bentz*, 11 Mo. 61; *St. Louis* v. *Cafferata*, 24 Mo. 94; *State* v. *Williams*, 11 S. C. 288; *Hamilton* v. *State*, 3 Tex. App. 643; *McLaughlin* v. *Stephens*, 2 Cranch C. C. 148; *United States* v. *Wells*, 2 Cranch C. C. 45; *City of St. Louis* v. *Schoenbusch*, 95 Mo. 618; *State* v. *Beattie*, 16 Mo. App. 142; *Brownville* v. *Cook*, 4 Neb. 101.

The only remaining question is, Was the burden on plaintiffs to prove that the ordinances were published in the manner prescribed by the statutes? We think not. The statute makes printed copies of the ordinances of any city or incorporated town, published by the authority of such city or town, and manuscript copies of the same, copied by the proper officer, and having the seal of the city or town attached, evidence of the existence of the ordinances and their contents; and makes the failure to publish a sufficient defense to any suit or prosecution for the fines or penalties imposed by the ordinances: Mansfield's Digest, secs. 771–773, 2835.

The judgments in the first two cases are reversed, and the judgment in the last is affirmed.

MUNICIPAL CORPORATIONS. — Under the charter of the city of Montgomery, approved in 1889, a conviction in the municipal court of an offense which is also a misdemeanor under a general statute is a bar to a prosecution by the state for the misdemeanor: *Engelhardt* v. *State*, 88 Ala. 100. *Contra*, *McRea* v. *Mayor*, 59 Ga. 168; 27 Am. Rep. 390.

MUNICIPAL ORDINANCES — PUBLICATION. — It is presumed, in the absence of proof to the contrary, that an ordinance was duly published: *Bayard* v. *Baker*, 76 Iowa, 220.

KESSINGER *v.* WILSON.

[38 ARKANSAS, 400.]

SALE OF HOMESTEAD OF DECEDENT DURING MINORITY OF HIS CHILDREN VOID. — Where land owned by a father who leaves minor children was a homestead at the time of his death, a sale thereof made during their minority is void.

ESTATES OF HOMESTEAD AND OF INHERITANCE SEPARATE AND DISTINCT WHEN. — Where a father seised of a homestead dies leaving two minor children as his heirs, they have two separate and distinct estates in the land, — an estate of homestead and an estate of inheritance, — their right to the possession and enjoyment of which does not exist at one and the same time, and neither of which estates is merged in the other. The heirs, in such case, have two rights of entry upon the land, — one when they become entitled to the homestead, and the other when the younger attains his majority.

LOSS OF ONE OF TWO CONCURRENT RIGHTS OF ENTRY DOES NOT IMPAIR THE OTHER. — Where the same person has two separate rights of entry, the loss of one by lapse of time does not impair the other.

LIMITATION OF FIVE YEARS FOR RECOVERY OF LANDS SOLD AT JUDICIAL SALE NOT APPLICABLE WHEN. — A right of action against a purchaser at a judicial sale which accrues to the party claiming it more than five years after the date of the sale is not barred by the five years' limitation of the statute requiring all persons to bring suits against purchasers at judicial sales within five years after the date of the sale, or be thereafter barred. This provision applies to the enforcement of only such rights to recover the land sold as can be enforced in an action brought within that time.

EJECTMENT. The opinion states the case.

F. G. Taylor, for the appellants.

J. C. Hawthorne, for the appellees.

BATTLE, J. On the 5th of February, 1883, appellants brought an action of ejectment against appellees, in the Clay circuit court, for the possession of certain land described in their complaint. Appellees pleaded the five and seven years' statutes of limitations in bar of the action. On the trial it was admitted that Daniel Kessinger died seised and possessed of the land in the month of July, 1862; that it constituted his homestead at the time of his death; that he was the father of appellants, Nancy J. Casey and John Kessinger; that Nancy J. was born on the 10th of December, 1859, and John Kessinger on the 10th of December, 1861. Evidence was adduced tending to prove that the land was sold, under an order of the probate court of Clay County, on the twenty-second day of January, 1872, to Abe Roberts to pay the debts of Daniel Kessinger, and that appellees claim and hold

under Abe Roberts. It was also admitted that appellees and those under whom they claim have been in continuous and adverse possession of the land at all times since the first day of July, 1874, and that there is no record evidence that the sale to Roberts was reported to the probate court. The result of the trial was a judgment in favor of the appellees.

As the land was the homestead of Daniel Kessinger at the time of his death, and he left minor children, the sale thereof during their minority was void. The only question involved, then, is, Was this action barred by the statute of limitations?

At the time the grantors of appellees took possession of the land in controversy each of the appellants had the right to hold the same as a homestead until he or she ceased to be a minor. They were also heirs of Daniel Kessinger, and the land had descended to them subject to sale, if necessary, for the payment of their father's debts. These facts present the question, Did not they have two rights of entry,—one at the time when they became entitled to the homestead, and the other when the younger of them reached the age of twenty-one years?

The land was set apart by the law to appellants, when their father died, as a home and means of maintenance during their minority. Until the younger of them reached the age of twenty-one years, it could not have been lawfully sold to pay the debts of their father's estate, or partitioned between them: *Nichols* v. *Shearon*, 49 Ark. 75; *Kirksey* v. *Cole*, 47 Ark. 504. It was not subject to sale, but might have been rented to raise means for their support. Until the younger reached his majority, it remained set apart as "a place, a sanctuary, to which he or she might return to find the shelter, comfort, and security of a home" during his or her minority. As an entire homestead, it remained the home of both. Although the land constituting it descended to them subject to be sold to pay the debts of their father's estate, it could not have been lawfully severed or diverted from the full occupancy and enjoyment by both of them as a home during the minority of either of them. Their homestead right was like a joint tenancy with right of survivorship. As each of them arrived of age, his interest in it expired. After the older reached her majority, the younger was entitled to the exclusive use and enjoyment of the land as a home until he became twenty-one years old, and then both became entitled to have and to hold as tenants in common, subject to the right of the adminis-

trator of Daniel Kessinger to have it sold to pay Kessinger's debts: *Kirksey* v. *Cole*, 47 Ark. 504. The homestead right or estate and the estate inherited in addition thereto were like two separate and distinct estates, vested in different persons, and following in immediate succession. Their right to the enjoyment and possession of the same did not exist at one and the same time, and neither merged in the other. The former did not merge in the latter; for in that event, the minor children would have lost the right to enjoy the homestead during their minority, and the land constituting it would have immediately become subject to sale for the payment of the debts of their father's estate, it being insolvent, and the quality of the homestead, like unto a joint tenancy, would have been changed by severance to tenancy in common: 6 Greenleaf's Cruise on Real Property, 484, and cases cited. And the estate inherited from their father, being the larger, could not merge in the homestead. So they remained separate and distinct. As they could not have been held otherwise, appellants necessarily had two rights of entry upon the land,—one when they became entitled to the homestead, and the other when the younger was twenty-one years old.

The homestead right has expired, and the right to the possession of the estate inherited in addition thereto has accrued. The time which expired before the last right of entry accrued did not affect it. The statute of limitations did not commence running against it until John Kessinger was twenty-one years old. The rule is, where there are two separate rights of entry, the loss of one by lapse of time does not impair the other. It has often been held that "a remainderman expectant on an estate for life or years, who had a right to enter because of the forfeiture of the tenant, is not bound to avail himself of the forfeiture, and his neglect to enter at the time does not bar him of his entry on the limitation of the estate by efflux of time or the death of the tenant." According to Plowden, in *Stowell* v. *Lord Zouch*, 1 Plow. 374, where there were three separate rights in the same person, he was entitled to the benefit of all of them, the same as though they existed in three different persons. The maxim of the law is, *Quando duo jura concurrunt in una persona, æquum est ac si essent in diversis: Hunt* v. *Burn*, 2 Salk. 422; *Wells* v. *Prince*, 9 Mass. 508; *Stevens* v. *Winship*, 1 Pick. 318; 11 Am. Dec. 178; *Doe ex dem. Cook* v. *Danvers*, 7 East, 299; *Goodright ex dem. Fowler and*

Burton v. *Forester*, 8 East, 552; *Kemp* v. *Westbrook*, 1 Ves. Sr. 278; *Doe ex dem. Allen* v. *Blakeway*, 5 Car. & P. 563; 24 Eng. Com. L. 709; 6 Bac. Abr. 369; 2 Greenleaf's Cruise on Real Property, vol. 3, p. 447, tit. 31, c. 22, secs. 34–36; Wood on Limitations, 528, note 1; Angell on Limitations, 6th ed., sec. 375; 4 Kent's Com. 84.

What statute prescribes the time within which an action for the recovery of the land must be brought after the last right of entry accrued? Appellees pleaded the five years' statute. That statute, as enacted, provides: "All actions against the purchaser, his heirs or assigns, for the recovery of lands sold by any collector of the revenue for the non-payment of taxes, and for lands sold at judicial sales, shall be brought within five years after the date of such sale, and not thereafter; saving to minors, persons of unsound mind, and persons beyond seas, the period of three years after such disability shall have been removed." Is it applicable to this case?

In *Elliott* v. *Pearce*, 20 Ark. 516, it was pleaded in bar of an action for the recovery of land held under a purchase at a tax sale. The defendant had held actual, continuous, adverse possession for five years from the date of the tax sale. This court held that the statute began to run from the date of the sale; and that though the sale was irregular, "it was sufficient, in connection with the actual possession of the land by the defendant during the entire period of limitation, to entitle him to have his possession protected, and his title quieted."

It was pleaded in *Cofer* v. *Brooks*, 20 Ark. 542; but it does not appear in that case when the deed was executed, and when possession was first taken by the purchaser at the tax sale. It does appear, however, that he was in possession on a certain day, with his family, residing on the land, clearing and preparing to raise a crop. This court said: "It may be conceded, for the purposes of this case, that their (the deeds') recitals fail to show regular and valid tax sales, and that the deeds are void; yet it was competent for the appellee to introduce them, in connection with the evidence of his actual and continuous possession of the land for the full period of limitation, to defeat the action of the appellant, as held in *Elliott* v. *Pearce*, 20 Ark. 516."

It was again pleaded in *Pillow* v. *Roberts*, 13 How. 472, but it does not appear in that case when possession was taken of

the land in controversy by the holder of the tax title. It was held in that case that though the deed executed to the purchaser at the tax sale for the land sold was irregular and worthless, it was admissible in evidence, in connection with evidence of five years' adverse possession, in order to establish a defense under the five years' statute of limitations.

After this, in *Mitchell* v. *Etter*, 22 Ark. 178, it was again considered. The land in controversy in that case was wild and uncultivated, and was claimed under a tax sale. This court held that the statute began to run in that case, in favor of the purchaser at the tax sale, against the former owner, at the date of the sale, whether the purchaser was in the actual possession of the land or not.

In *Phelps* v. *Jackson*, 31 Ark. 272, this court held that an action to set aside a sale of land under a decree of court, or to have the land conveyed to plaintiff, it having been purchased under an implied trust for his benefit, did not come within the provision of the five years' statute, and was not affected by it, because it was not an action for the recovery of land.

Statutes similar to the one under consideration have been construed in other states. In Pennsylvania, an act was passed in 1804 which decreed that no action for the recovery of land sold under it should lie, unless brought within five years after the sale. On account of the difficulty in bringing an action of ejectment against a purchaser who had not taken actual possession, it was held that the limitation did not commence running until possession was taken under the sale, and that the original owner might bring an action for the land within five years after possession was taken: *Waln* v. *Sherman*, 8 Serg. & R. 357; 11 Am. Dec. 624; *Cranmer* v. *Hall*, 4 Watts & S. 36. After this an act was passed making provision for bringing an action of ejectment against a purchaser who had not taken possession, and then it was held that the limitation commenced to run from the delivery of the deed to the purchaser without regard to possession: *Robb* v. *Bowen*, 9 Pa. St. 71; *Sheik* v. *McElroy*, 20 Pa. St. 31; *Burd* v. *Patterson*, 22 Pa. St. 219; *Stewart* v. *Trevor*, 56 Pa. St. 385; *Rogers* v. *Johnson*, 67 Pa. St. 48; *Johnston* v. *Jackson*, 70 Pa. St. 164; *Hole* v. *Rittenhouse*, 19 Pa. St. 305; *McReynolds* v. *Longenberger*, 57 Pa. St. 13.

In Iowa, a statute declares that no action for the recovery of real property sold for the non-payment of taxes shall lie, unless the same shall be brought within five years from the date of sale, with a proviso giving further time to infants and

insane persons. The supreme court of that state holds that this statute begins to run against the purchaser at the tax sale, and those claiming under him, as soon as his right to a deed becomes complete, and against the original owner when the deed is recorded, holding that the word "sale" means a complete sale, and that the sale is not completed until the title is vested. It holds that the Iowa statutes fix the time when the deed can be executed, and that the tax purchaser cannot, by neglecting to take his deed, prevent the statutes running against him; and that, under the statutes of that state, the title does not vest in the purchaser until the deed is executed and recorded: *Thornton* v. *Jones*, 47 Iowa, 397; *Eldridge* v. *Kuehl*, 27 Iowa, 160; *Henderson* v. *Oliver*, 28 Iowa, 20; *McCready* v. *Sexton*, 29 Iowa, 356; *Hintrager* v. *Hennessy*, 46 Iowa, 600; *Bailey* v. *Howard*, 55 Iowa, 290; *Thomas* v. *Stickle*, 32 Iowa, 76; *Barrett* v. *Love*, 48 Iowa, 103; *Francis* v. *Griffin*, 72 Iowa, 23. And it held that this statute became a complete bar, at the expiration of the five years, to the maintenance of an action brought after that period against the owner or purchaser for the recovery of the land sold for taxes, if such owner or purchaser held possession of the land at and before the bar became complete, although such possession continued for a small portion of the statutory period: *Barrett* v. *Love*, 48 Iowa, 103. But if the purchaser was in the constructive possession of the land, and such possession was taken by the owner in a manner and under circumstances which were calculated to, and did, deprive the purchaser of an opportunity of vindicating his right to the land by bringing suit within the time prescribed by the statute, it held the five years would be no bar: *Francis* v. *Griffin*, 72 Iowa, 23; *Griffin* v. *Turner*, 75 Iowa, 250.

Alabama has a statute precisely like that of Iowa. There the courts hold that the bar of their statute begins to run only from the time the deed is executed to the purchaser at the tax sale; and that when the purchaser has continued in the open and continuous possession of the land sold for taxes, claiming title for the period of limitation, the statute cuts off all inquiry into the regularity of the sale, and operates a bar to an action brought for the recovery of the land: *Jones* v. *Randle*, 68 Ala. 258; *Pugh* v. *Youngblood*, 69 Ala. 296.

A statute of Wisconsin provides that "any suit or proceeding for the recovery of land sold for taxes, except in cases where the taxes have been paid, or the land redeemed as

provided by law, shall be commenced within three years from the time of recording the tax deed of sale, and not thereafter." This statute was held to commence running from the date of the record of the deed, and to apply to the original owner and the tax purchaser, and to cut off either the original owner or tax purchaser, if the adverse claimant has been in the occupation of the land for the three years from the date of the record: *Knox* v. *Cleveland*, 13 Wis. 245; *Jones* v. *Collins*, 16 Wis. 594; *Parish* v. *Eager*, 15 Wis. 537; *Whitney* v. *Marshall*, 17 Wis. 174; *Edgerton* v. *Bird*, 6 Wis. 538; 70 Am. Dec. 473; *Sprecher* v. *Wakeley*, 11 Wis. 432. It was also held that "when the land is unoccupied, the holder of the tax title has constructive possession, and if the owner of the original title does not bring ejectment (which the statute permits in such case) within the three years, he is barred, but that if the tax deed is void on its face, the grantee in it has no constructive possession, and in such case the statute does not run in his favor, though it would do so, even under a void deed, if his possession was actual, open, and notorious": *Knox* v. *Cleveland*, 13 Wis. 245; *Parish* v. *Eager*, 15 Wis. 537; *Jones* v. *Collins*, 16 Wis. 594; *Lawrence* v. *Kenney*, 32 Wis. 296; *Hill* v. *Kricke*, 11 Wis. 446; *Dean* v. *Earley*, 15 Wis. 100; *Lain* v. *Shepardson*, 18 Wis. 59; *Cutler* v. *Hurlbut*, 29 Wis. 152; *Lindsay* v. *Fay*, 25 Wis. 460; *Edgerton* v. *Bird*, 6 Wis. 527; 70 Am. Dec. 473; *Sprecher* v. *Wakeley*, 11 Wis. 432; *Oconto Co.* v. *Jerrard*, 46 Wis. 326; *McMillan* v. *Wehle*, 55 Wis. 685. On the other hand, a similar possession on the part of the original owner for any part of the statutory period would interrupt the running of the statute against him, notwithstanding the tax deed is recorded: *Lewis* v. *Disher*, 32 Wis. 504; *Wilson* v. *Henry*, 35 Wis. 241; 40 Wis. 594; *Coleman* v. *Eldred*, 44 Wis. 210; *Smith* v. *Ford*, 48 Wis. 162; *Stephenson* v. *Wilson*, 50 Wis. 99.

A Kansas statute provides that "any suit or proceeding for the recovery of land sold for taxes, except in cases where the taxes have been paid, or the land redeemed as provided by law, shall be commenced within two years from the time of recording the tax deed of sale, and not thereafter." The decisions of the courts construing this statute are to the effect that an action brought after a tax deed, which was good on its face, had been recorded for two years, for the recovery of the land sold for taxes, and described therein, against the grantee in the deed, or one holding under him, who was in

possession of the same and had been for two years, was barred by this statute, but that it was not barred if the deed was void on its face, although the grantee, or the one holding under him, had held actual, open, notorious, and adverse possession for the entire two years next after the date of recording: *Taylor* v. *Miles*, 5 Kan. 498; 7 Am. Rep. 558; *Shoat* v. *Walker*, 6 Kan. 73; *Bowman* v. *Cockrill*, 6 Kan. 311; *Sapp* v. *Morrill*, 8 Kan. 677; *Hall* v. *Dodge*, 18 Kan. 281; *Waterson* v. *Devoe*, 18 Kan. 223.

A Missouri statute is as follows: "Any suit or proceeding against the tax purchaser, his heirs or assigns, for the recovery of the lands sold for taxes, or to defeat or avoid a sale or conveyance of the lands for taxes, ... shall be commenced within three years from the time of recording the tax deed, and not thereafter." In *Spurlock* v. *Dougherty*, 81 Mo. 171, the court held that this statute did not apply where the owner was in possession; and in *Mason* v. *Crowder*, 85 Mo. 526, it held that it had no application, except where the tax deed is valid upon its face, and that adverse possession under a tax deed, void on its face, for three years from the time the deed was recorded, would not constitute a bar under this statute; that the limitation of the statute is not based upon adverse possession.

From the foregoing view of authorities, it appears that courts are nearly agreed in construing statutes like the five years' statute pleaded in this case as to the time they commence running. They hold that statutes of limitation, clear and unambiguous, like the five years' statute of this state, begin to run according to their words, from the date of sale, record, or other day, as the time may be thereby fixed. They differ, however, as to the necessity for possession for the full statutory period on the part of the party pleading the limitation; or if he had possession, as to the effect of it. But no question of that sort is presented for our consideration. The only questions presented as to the five years' statute are, When does it begin to run? and Is it applicable to this case?

The words of the statute are: "All actions shall be brought within five years after the date of such sale, and not thereafter." It is clear that it commences to run from the date of sale, and not thereafter, as it declares. As it begins to run at the date of the sale, it is difficult to understand how it can bar an action when the cause of it did not arise until more than ten years after the sale had elapsed. The sustain-

ment of a contention to that effect would lead to the absurd conclusion that all rights of action against the purchaser of land sold at a judicial sale, arising after the lapse of five years from the date of sale, are barred at the very instant the cause of action accrues. This would be equivalent to a denial of the right to be heard at all in the vindication of such rights. It is manifest that the statute was never intended to be applied in such cases, but that its object was to require all parties to bring suits against purchasers at judicial sales within five years after the date of sale, for the enforcement of only such rights to recover the land sold as can be enforced in an action brought within that time, and to bar the recovery of such rights in any suit brought thereafter. It has no application to this action. The only statute of limitation at all applicable to this case is the seven years' statute.

According to the evidence adduced in the trial of this action in the circuit court, appellants' right of action is not barred.

Reversed, and remanded for a new trial.

HOMESTEAD. — A homestead is secured to the use of the family as long as the family continues to exist, and the head thereof to occupy it: *Hoffman* v. *Neuhaus*, 30 Tex. 633; 98 Am. Dec. 492; *First Nat. Bank* v. *Massengill*, 80 Ga. 333; *Barrett* v. *Dunham*, 80 Ga. 336; *Hart* v. *Evans*, 80 Ga. 330. Having secured a homestead for his minor children, a man remarried and had another child. The second wife and her child became members of the family and entitled to rights in the homestead: *Nelson* v. *Commercial Bank*, 80 Ga. 329; and the homestead does not terminate upon the arrival at majority of the children of the first wife: *Dismuke* v. *Eady*, 80 Ga. 289. The homestead rights of minor heirs terminate upon their attaining the age of majority: *Fountain* v. *Hendley*, 82 Ga. 617; *Lee* v. *Hale*, 77 Ga. 1. It is only when the owner of the homestead dies without disposing thereof that it passes to his widow and children. Thereafter it may be alienated, subject to their joint tenancy: *Derr* v. *Wilson*, 84 Ky. 14. The rights of minors in a homestead are under control of their parents during the joint lives of the latter: *Brown* v. *Coon*, 36 Ill. 243.

LIMITATIONS OF ACTIONS — WHEN THE STATUTE BEGINS TO RUN. — The general rule is, that until one has a cause of action no statute of limitations can operate against him: Note to *Garvin* v. *Garvin*, 17 Am. St. Rep. 55. And this rule applies both in actions on contract: *Tillison* v. *Ewing*, 87 Ala. 350; *Cooper* v. *Cooper*, 132 Ill. 80; *Schoonover* v. *Vachon*, 121 Ind. 3; *Bank of Reinbeck* v. *Brown*, 76 Iowa, 696; *Joyce* v. *Means*, 41 Kan. 234; *Lewis* v. *Pendergast*, 39 Minn. 301; *Bartel* v. *Mathias*, 19 Or. 482; *Van Sickle* v. *Catlett*, 75 Tex. 404; and actions in tort: *Lyles* v. *Roach*, 30 S. C. 292; *Gale* v. *McDaniel*, 72 Cal. 334; *Works* v. *Kennedy*, 70 Tex. 233; *Randall* v. *Duff*, 79 Cal. 116. This principle applies to tax sales and the enforcement of rights accruing thereunder: *St. Louis etc. R'y Co.* v. *Alexander*, 49 Ark. 190; *Perkins* v. *Gaither*, 70 Md. 134; *Webster* v. *Schwears*, 69 Wis. 89.

HARVEY v. STATE.

[58 ARKANSAS, 425.]

BURGLARY WITH INTENT TO COMMIT RAPE ON WOMAN ASLEEP. — A man who burglariously enters a house with intent to have sexual intercourse with a woman while she is asleep is guilty of burglary.

INDICTMENT for burglary. The opinion states the case.

Marshall and Coffman, for the appellant.

W. E. Atkinson, attorney-general, and T. D. Crawford, for the appellee.

HUGHES, J. The appellant was tried in the Pulaski circuit court upon an indictment containing two counts, in the first of which he is charged with burglary, committed with the intent to steal, and in the second of which he is charged with burglary committed with the intent to commit rape. He was convicted on the second count, filed a motion for a new trial, which was overruled, and appealed to this court.

The evidence in the case was circumstantial, and it is contended for appellant that it was neither sufficient to identify the person who entered the house as the appellant, nor to show the intent with which the entry was made. Upon the question of the identity of the appellant as the person who entered the house, we think there was sufficient evidence to support the verdict of the jury. Upon the question of the intention of the defendant in entering the house, the testimony shows that he entered it at about or after twelve o'clock at night, and that when discovered, he retired through a window which was closed, and the blinds to which were fastened, when the woman who was assaulted went to bed in the early part of the night, and that a slat in the blinds had been cut, so as to admit a hand to unfasten them. The testimony further showed that Mrs. Eva Dean was sleeping in the front room of the house of Mrs. Foster on that night, with her little boy, who was sick, and that Foster and his wife were in an adjoining room in bed; that about twelve o'clock Mrs. Dean, upon whom the assault is charged to have been made, was awakened from sleep by some one breathing hard right over or near her face, and touching a private part of her person. She screamed, and saw a broad-shouldered man getting out of the window. There was a lamp burning in the adjoining room, occupied by Foster, who had at intervals that night been handing in medicine to Mrs. Dean for her sick boy, through a door which stood ajar between the two rooms.

The appellant was a stranger to Mrs. Dean, and could not have reasonably supposed that she would consent to submit to his embraces. He evidently must have known that she was asleep at the time he stood over her, with his face near hers, and touched a private part of her person. We think the evidence was sufficient to warrant the jury in believing that it was the intention of appellant, in entering the room, to have sexual intercourse with Eva Dean, without her consent, and while she was asleep, and that the assault upon her person was made with that intent. As we understand the law, this constituted burglary with the intent to commit rape. "Rape is the carnal knowledge of a female, forcibly, and against her will": Mansfield's Digest, sec. 1568. We have considered the cases of *Sullivant* v. *State*, 8 Ark. 400, and *Charles* v. *State*, 11 Ark. 390, and cannot assent to the doctrine of the latter cases, that if the prisoner designed to accomplish his purpose while the woman was asleep, he was not guilty of an attempt to commit rape.

We think the more reasonable and the correct doctrine is laid down in *Regina* v. *Mayers*, 12 Cox C. C. 311, which is, in substance, that "if a man has, or attempts to have, connection with a woman while she is asleep, it is no defense that she did not resist, as she is incapable of resisting. The man can therefore be found guilty of a rape, or of an attempt to commit a rape." In this case, Lush, J., said to the jury: "Therefore, what you must consider is this: Did the prisoner come into the prosecutrix's room with the intention of having connection with her while she was asleep? If he did have connection with her while she was asleep, he is guilty of rape; if he only attempted to do so, he is guilty of the attempt."

As to the other questions raised in the case, we do not think they are material, and we therefore decline to discuss them.

The judgment is affirmed.

BURGLARY, WHAT CONSTITUTES. — Burglary consists in breaking into and entering a dwelling-house in the night-time with intent to commit a felony: *State* v. *McCall*, 4 Ala. 643; 39 Am. Dec. 314; *State* v. *Méche*, 42 La. Ann. 273; as breaking into a house under such circumstances with intent to commit rape: *State* v. *Powell*, 94 N. C. 965.

STALEY v. LEOMANS.

[53 ARKANSAS, 428.]

PURCHASE AT TAX SALE BY ONE CLAIMING UNDER PRIOR VOID TAX TITLE VALID WHEN. — A party who is out of possession of land, and whose only claim thereto is based upon a tax deed void on its face, may acquire a valid title by purchase at a subsequent tax sale, although the land was assessed to him.

SCHOOL TAX NOT INVALIDATED BY IRREGULAR RETURN OF JUDGES OF ELECTION. — The omission of the judges of a school election to state in their return to the county court the number of votes cast for and against the school tax assessed against the land in the district does not invalidate a sale of such land for taxes.

EJECTMENT for certain land. The plaintiffs, in 1882, purchased the land for taxes levied under an unconstitutional act, and in 1885 procured a deed which defectively described the land. In 1883, the land was assessed in their names and forfeited for taxes, and they procured an agent to purchase it at the collector's sale, and took a deed to it in their own names. The defendants were in possession of the land. No objection was made to the last tax deed except the omission of the judges of the district school election to state in their return to the county court the number of votes cast for and against the school tax which was assessed against this land. The trial court held that as the land was assessed to the plaintiffs, their purchase simply removed the encumbrance of the taxes assessed on the land in their names, and conferred upon them no greater title than they formerly had.

W. R. Coody, for the appellants.

John W. and J. M. Stayton, for the appellees.

COCKRILL, C. J. The defendants were the owners and in possession of the land in suit, enjoying the rents and profits, when the land was assessed and sold for non-payment of taxes. It was their duty, therefore, to the state and to adverse claimants of the title to pay the taxes: *Gwynn* v. *McCauley*, 32 Ark. 97, and cases cited. The plaintiffs were out of possession, claiming title under tax deeds void on their face. They were under no legal obligations to the state or the defendants to pay the taxes. Nor did the naked fact that the lands had been assessed to them change their position: *Pleasants* v. *Scott*, 21 Ark. 371; 76 Am. Dec. 403. As there is nothing in the relationship of the parties upon which an estoppel can be raised, and no question of public policy is contravened, they

should be allowed to retain whatever advantage they may have gained by the purchase: Cooley on Taxation, 2d ed., 506 et seq.; Black on Tax Titles, sec. 148.

The only objection urged here against the deed is answered in favor of its validity in *Holland* v. *Davies*, 36 Ark. 446.

Reverse, and remand for a new trial.

PURCHASERS AT TAX SALE. — A to who may acquire title by purchasing at a tax sale, see *Broquet* v. *Warner*, 43 Kan. 48; 19 Am. St. Rep. 124, and note.

WATTERS *v.* WAGLEY.

[38 ARKANSAS, 509.]

TITLE TO LAND CANNOT BE DIVESTED BY SURRENDER AND CANCELLATION OF GRANTEE'S DEED.

MARRIED WOMAN CANNOT BIND HERSELF BY EXECUTORY CONTRACT TO CONVEY her real estate.

THE opinion states the case.

Marshal and Coffman, for the appellant.

Crump and Watkins, for the appellee.

HUGHES, J. Allen Tennison and his wife, Nancy, conveyed a tract of land that belonged to Mrs. Tennison to Angia Crawford, a married woman, who, with her husband, L. D. Crawford, mortgaged part of the same land to Tennison and his wife to secure a balance of $175 of the purchase-money. About the 1st of April, 1886, Tennison and his wife assigned the mortgage to J. C. Wagley, the appellee, who brought suit to foreclose the same. After the assignment of the mortgage to appellee, appellant Watters bought the land mortgaged from Angia Crawford, and on the 13th of November, 1886, before the mortgage was recorded, took a deed from Tennison and wife for the land, but took no deed from Angia Crawford, who only surrendered up to Tennison and wife their deed to her for the land. A decree of foreclosure was rendered in favor of appellee, from which appellant has appealed.

There was no conveyance from Mrs. Crawford to Watters; and he obtained no title by the conveyance from Tennison and wife, who had previously conveyed the land to Angia

Crawford, as the title of Mrs. Crawford was not divested by the surrender and cancellation, or destruction, of her deed from Tennison and wife. That title to land cannot be divested or conveyed by the surrender and cancellation of a grantee's deed has been often decided by this court: *Campbell* v. *Jones*, 52 Ark. 493, and cases cited.

There was no cross-bill by Watters, and the question whether Watters might have had a lien declared in his favor against Mrs. Crawford for the purchase-money he paid her is not raised in the case.

In the case of *Rockafellow* v. *Oliver*, 41 Ark. 169, cited by counsel, the court said there was no question of coverture raised, and the case was decided upon the theory that the coverture of Mrs. Oliver at the time she conveyed to Counts could not be considered, and it cut no figure in the case. If the contract of Mrs. Crawford to sell the land to appellant was an executory contract to convey her land, it was void, according to the repeated decisions of this court that a married woman cannot bind herself by an executory contract to convey her real estate: *Feltner* v. *Tighe*, 39 Ark. 361, and cases cited.

The decree of the court below is affirmed.

DEEDS — CANCELLATION AND SURRENDER, EFFECT OF. — The surrender or destruction of a deed, unrecorded, even by mutual consent, does not revest the title in the grantor: *Lawton* v. *Gordon*, 34 Cal. 36; 91 Am. Dec. 670, and note; *Rogers* v. *Rogers*, 53 Wis. 35; 40 Am. Rep. 756. *Contra*, *Mussey* v. *Holt*, 24 N. H. 248; 55 Am. Dec. 234.

MARRIED WOMEN — EXECUTORY CONTRACTS. — The general rule is, that the executory contracts of a married woman cannot be enforced against her: *Warwick* v. *Lawrence*, 43 N. J. Eq. 179; 3 Am. St. Rep. 299; *Gale* v. *Smart*, 101 Mo. 550.

CASES

IN THE

SUPREME COURT

OF

CALIFORNIA.

[In Bank.]

Flickinger *v.* Shaw.

[87 California, 126.]

Irrevocable License, What is. — An agreement between a land-owner and two other persons that the latter may survey, excavate, and keep in repair a ditch over the lands of the former, which, when completed, should be used by all the parties in irrigating their respective lands, gives the transaction the character of a purchase by the one party, and a sale by the other, of the right of way for a ditch, and if the work has been done, the land-owner cannot recall his consent, fill up the ditch, and thereby deprive the others, or their successors in interest, of the use of the ditch or the waters running therein.

License to Construct and Maintain a Ditch becomes Irrevocable when the licensee makes improvements or invested capital in consequence of it.

Specific Performance will be Decreed of an Agreement whereby a land-owner stipulates that a ditch may be constructed on his land, that after it is constructed certain waters shall be appropriated, and that he will convey to the persons constructing the ditch one half of the waters so appropriated and of the right of way over his land for the ditch, and acting under this agreement, the other parties have entered upon the land, and constructed the ditch.

Action to obtain a judgment declaring that the plaintiff is the owner of a ditch and the right of way therefor over the lands of the defendant, and is the owner of the use of eleven hundred inches of the water of a certain creek, and is also the owner of the residue of the waters flowing in such creek to the extent of four thousand inches, after supplying the waters of the first-named ditch, and to enjoin interference with the flowing of water. Plaintiff and one Smith owned a tract of land bounded on the northeast by the lands of the defendant,

and the water flowed along defendant's eastern boundary. In 1880, defendant made an oral agreement that plaintiff and Smith might survey, construct, and keep in repair a ditch by which the waters of the creek should be diverted, and that plaintiff and Smith should be entitled to one half of the water so diverted and the right of way over defendant's lands for the ditch. Acting under this agreement, plaintiff and Smith constructed the ditch at their exclusive expense, and afterwards enlarged it until it had a carrying capacity of eleven hundred inches of water. It was further agreed that the waters of the creek should be appropriated, and that the defendant should convey to plaintiff and Smith one half thereof, and the right of way over his land for the ditch. The defendant, however, made the appropriation of water in his own name. Before December, 1885, plaintiff acquired Smith's interest, and he posted a notice claiming four thousand inches of the waters of the creek, and constructed another ditch for the purpose of diverting the waters so claimed; but he did not claim the right to take water for this ditch, except after the original ditch had been filled to its capacity of eleven hundred inches. The defendant enlarged the capacity of the original ditch to two thousand inches, and denied the right of the plaintiff to any of the waters flowing therein. The trial court affirmed the plaintiff's right to one half of the eleven hundred inches of water and to one half of the ditch, and also to the surplus waters of the creek over eleven hundred inches to the extent of four thousand inches, and enjoined the defendant from interfering with the plaintiff's rights.

T. H. Laine, and Richards and Welch, for the appellants.

J. C. Black, for the respondent.

THORNTON, J. That the object to be attained by the agreement between Flickinger and Smith on the one hand, and the defendant Shaw on the other, was to acquire by purchase a right of way over the land of the latter for the ditch constructed by the first-named parties is, in our judgment, a fair legal deduction from the facts disclosed in this case. Flickinger and Smith were seeking to acquire something more than a mere license or authority to do a particular act or series of acts on another's land without possessing any estate therein (*Potter* v. *Mercer*, 53 Cal. 673), and which right might at any time be revoked by the licensor.

In this case, the agreement between the parties is, in substance, that Shaw gives the right of way for a ditch over his land; that Flickinger and Smith survey and excavate the ditch, and keep it in repair, and the ditch, when completed, to be used for the benefit of all the contracting parties in irrigating their respective tracts of land. Let it be observed (and it is so found) that Shaw agreed that Flickinger and Smith should have a conveyance of and give a right of way over his land for the ditch, and one half of the water to be diverted thereby.

The above facts clothe the transaction with the character of a purchase by one party, and sale by the other, of a right of way for a ditch. The license under which Flickinger and Smith entered was vested in them by a contract of purchase for a valuable consideration.

Under this agreement, Flickinger and Smith did survey and construct the ditch and kept it in repair, and both parties made use of it for the purpose for which it was constructed; viz., the irrigation of their lands. Thus the agreement between the parties was executed. The license here given to Flickinger and Smith was one for the acquisition of an interest in land by purchase of Shaw, for which they paid by doing what they had agreed to do. After the ditch was constructed, it was used by all parties under the agreement for four or five years.

Now, it would be highly inequitable, after the work has been done and money expended by Flickinger and Smith, to allow Shaw to recall his consent, fill the ditch, and cut Flickinger, who has succeeded to all the rights of Smith under the agreement above stated, off from the use of the ditch and the water flowing therein; nor should any such proceeding, in our view, be upheld by a court of justice.

In *Rerick* v. *Kern*, 14 Serg. & R. 271, 16 Am. Dec. 497, a case in some respects similar to the one under consideration, came before the supreme court of Pennsylvania. The case was one concerning the legal effect of an executed license. It was an action on the case to recover damages for diverting a watercourse, by which the plaintiff lost the use of his saw-mill. The facts were as follows: Kern, the plaintiff below, being about to erect a saw-mill on a stream designated as the right-hand stream, a better seat for the mill was found by his mill-wright on what was termed the left-hand stream. Kern thereupon applied to Rerick for permission to turn the water

of the other stream into the left-hand stream, which was granted. In consequence of this permission, Kern built the mill on the left-hand stream. The mill was rendered a third more valuable by the union of the two streams than it would have been with the right-hand stream alone. No deed was executed, nor was any consideration given, but Kern, in consequence of the permission given by Rerick, built a very good mill, which did a great deal of business, and which he would not have built on the left-hand stream if the permission had not been given.

In this case, as will be observed, there was no element of purchase.

The defense set up was, that the permission to Kern was a mere license which was revocable under all circumstances and at any time. To this it was said, in the unanimous opinion of the court, by Gibson, J.: "But a license may become an agreement on valuable consideration, as where the employment of it must necessarily be preceded by the expenditure of money; and when the grantee has made improvements or invested capital in consequence of it, he has become a purchaser for a valuable consideration. Such a grant is a direct encouragement to expend money, and it would be against all conscience to annul it as soon as the benefit expected from the expenditure is beginning to be perceived. Why should not such an agreement be decreed in specie? That a party should be let off from his contract, on payment of a compensation in damages, is consistent with no system of morals but the common law, which was in this respect originally determined by political considerations, the policy of its military tenures requiring that the services to be rendered by the tenant to his feudal superior should not be prevented by want of personal independence. Hence the judgment of a court of law operated on the right of a party, and the decree of a court of equity on the person. But the reason of this distinction has long ceased, and equity will execute every agreement for the breach of which damages may be recovered, where an action for damages would be an inadequate remedy."

The same rule has been applied in case of an executed license in *Pope* v. *Henry*, 24 Vt. 565, and also in *Swartz* v. *Swartz*, 4 Pa. St. 358; 45 Am. Dec. 697.

The principle on which these cases proceed is, as was said in *Swartz* v. *Swartz*, 4 Pa. St. 358, 45 Am. Dec. 697, "that the revocation would be a fraud; and that to prevent it a chan-

cellor would turn the owner of the soil into a trustee *ex maleficio*." The case under consideration presents a stronger ground of relief than either of these above cited.

Principle and authority, in our judgment, show that the plaintiff has rights here which should be protected by injunction. The facts show plaintiff's right to a specific performance. The statute of frauds is not in the way. There has been part performance, and possession under the agreement, as far as the plaintiff could obtain possession, and though the agreement rests in parol, under the circumstances above mentioned, a party is entitled to a specific performance: *Rerick* v. *Kern*, 14 Serg. & R. 272; 16 Am. Dec. 497. To refuse specific performance under the circumstances would be to sanction fraud, and to allow a statute passed for the prevention of frauds to become the means of accomplishing a fraud.

To complete the purchase, nothing remains to be done except the execution of a conveyance of the right of way and a proper proportion of the water to Flickinger. His equity to a deed is perfect: *Morrison* v. *Wilson*, 13 Cal. 494; 73 Am. Dec. 593; and when such is the case, a court of equity, in accordance with its familiar rules considering that as done which ought to be done, will protect it as readily and fully as a legal title. If the legal title would be protected by an injunction, a perfect equitable title should also.

In conformity with these views, in our opinion the judgment should be affirmed.

LICENSE, WHEN IRREVOCABLE: See *Grimshaw* v. *Belcher*, 88 Cal. 217, *post*, 298, and note. Ordinarily, a mere license is revocable; but when connected with an interest or grant, the licensor cannot revoke it so as to defeat the grant or interest to which it is incident: *Long* v. *Buchanan*, 27 Md. 502; 92 Am. Dec. 653, and note. See note to *Hazleton* v. *Putnam*, 54 Am. Dec. 166, 167.

SPECIFIC PERFORMANCE. — SPECIFIC PERFORMANCE is a subject for the sound discretion of the court: *Conger* v. *New York etc. R. R. Co.*, 120 N. Y. 30; *Fishburne* v. *Ferguson*, 85 Va. 321; *Page* v. *Martin*, 46 N. J. Eq. 585. Inadequacy of legal remedies is the test of equity jurisdiction to enforce personal covenants: *Knott* v. *Mfg. Co.*, 30 W. Va. 790. The party seeking such relief must not himself be in default: *Walters* v. *Walters*, 132 Ill. 467. Verbal agreements partly performed by one of the parties may be specifically enforced: *Burlingame* v. *Rowland*, 77 Cal. 315; *Ridgway* v. *Ridgway*, 69 Md. 242; *Evans* v. *Miller*, 38 Minn. 245. Specific performance will not be decreed when the contract is unfair: *McElroy* v. *Maxwell*, 101 Mo. 294; or when it will work injustice: *Ford* v. *Euker*, 86 Va. 76; or where the petitioner had a complete remedy at law: *Angus* v. *Robinson*, 62 Vt. 60; *McCarter* v. *Armstrong*, 32 S. C. 203.

IN THE MATTER OF THE ESTATE OF BABY.

[87 CALIFORNIA, 200.]

APPEAL — JUDGMENT SATISFIED CANNOT BE REVIEWED UPON APPEAL. — Hence if persons to whom an estate was distributed by a decree of court have received and receipted for their full share so distributed to them, they cannot appeal from such decree, and any appeal which they may attempt to prosecute may be dismissed upon motion.

Galpin and Zeigler, for the appellants.

Page and Eells, and Pillsbury and Blanding, for the respondents.

THE COURT. The respondents have moved to dismiss the appeal herein on two grounds, viz.: 1. The judgment was satisfied by the appellants before the appeal was taken; 2. Notice of appeal was not served on Gibbs, one of the distributees.

The decree of distribution was entered March 24, 1890, and the notice of appeal was served May 12, 1890. On the eleventh day of April, 1890, there were filed in the court below two receipts, signed by the appellants, in which they respectively acknowledged that they had received from the administrator certain sums of money and personal property, in full of the distributive shares of the said estate allotted to them in and by the decree of distribution therein entered March 14, 1890.

When a judgment has been satisfied, it has passed beyond review; for the satisfaction thereof is the last act and end of the proceeding: *Morton* v. *Superior Court*, 65 Cal. 496; *People* v. *Burns*, 78 Cal. 645. "Payment produces a permanent and irrevocable discharge; after which the judgment cannot be restored by any subsequent agreement, nor kept on foot to cover new and distinct engagements": Freeman on Judgments, sec. 466; *Moore* v. *Floyd*, 4 Or. 260; *Cassell* v. *Fagin*, 11 Mo. 208; 47 Am. Dec. 151.

We are unable to say, from the record, that the rights of Gibbs would not be affected by a reversal of the decree; and in view of what has been said upon the first ground of the motion, it is unnecessary for us to pass upon the question whether it was necessary that he should be served with a notice of appeal.

The motion to dismiss is granted.

JUDGMENTS, REVIEW OF. — Judgments which have been satisfied cannot be reviewed on appeal: *Cassell* v. *Fagin*, 11 Mo. 207; 47 Am. Dec. 151.

MARTIN v. MORGAN.

[87 CALIFORNIA, 208.]

TIME IS OF THE ESSENCE OF A CONTRACT FOR THE SALE OF LAND, when it declares that the vendor will convey at any time within sixty days from the date of the contract, on the payment of the balance of the purchase price, and that such price shall be paid within such time, otherwise "the agreement to be null and void." The tender of the balance of the purchase price after the time designated will not entitle the vendee to specific performance of the contract.

Church and Cory, for the appellant.

Sayle and Coldwell, for the respondent.

SHARPSTEIN, J. This is an action to compel specific performance of a unilateral contract, by which the respondent agreed to convey to appellant's assignors a certain tract of land at any time within sixty days from the date of said contract, upon the following express conditions: The said assignors to pay to respondent $150 of the purchase-money down on the delivery of said contract, and the balance within sixty days from the date thereof, otherwise said agreement to be null and void. One hundred and fifty dollars was paid on the delivery of the contract, but the balance of the purchase price, to wit, $4,850, was not paid or tendered within sixty days from the date of said contract. As an excuse for not paying said balance within said sixty days, the plaintiff in his complaint alleges that before the expiration of said sixty days from the date of said contract, the defendant, for a valuable consideration, extended the time of performance on the part of his assignors to a reasonable time after the expiration of said sixty days. The court found that the defendant never extended the time for the performance of the conditions expressed in said agreement, or for the payment of any money stipulated to be paid as balance of the purchase price of said land, and rendered judgment in favor of the defendant. From that judgment, and the order overruling his motion for a new trial, this appeal is prosecuted by the plaintiff. We cannot say that the finding, of which we have above given the substance, was not justified by the evidence. We shall therefore consider the case as we would were there no claim made of an extension of the time specified in the written contract for the payment of the deferred payment. As before stated, plaintiff's assignors agreed to pay defendant $150 of said purchase-money down upon the

delivery of the agreement, and the balance within sixty days from the date thereof (August 31, 1887), otherwise the agreement to be null and void. Neither plaintiff nor his assignors performed, or offered to perform, the conditions expressed in said agreement within sixty days from the date thereof, and said agreement was not assigned to plaintiff within sixty days from the date thereof. The court finds that the plaintiff, after the assignment of said agreement to him, offered to pay and tendered all the balance of the purchase-money required to be paid by said agreement.

No other excuse or reason than the one above stated is alleged in the complaint, by plaintiff or his assignors, for nonperformance of the condition expressed in the contract. The plaintiff alleges that upon the delivery of said contract to his assignees, they entered into the possession of said land, and expended the sum of $270 in valuable improvements. The court finds: "That said M. J. and P. B. Donahoo (plaintiff's assignees) accepted said agreement and paid said sum of $150, and plowed said land, surveyed, mapped, and platted it into lots, but did not expend any sum of money whatever in the improvement of said real property." This finding is justified by the evidence introduced by the plaintiff as to what his assignors did upon the land, although one of the witnesses stated that the expense of the plowing was thirty dollars. We are not prepared to hold that what was done upon the land constituted an improvement.

We think the finding last above quoted is a sufficient finding that plaintiff's assignor entered into possession of said land at the time alleged in plaintiff's complaint.

The precise time at which plaintiff tendered the deferred payment provided for in the contract does not appear. But the court finds that he took an assignment of the contract after the time of making said payment had expired, and that after he had received such assignment he offered to pay all of the balance of the purchase-money due thereunder.

This brings us to what we deem the principal question in the case. Was time made the essence of this contract? In other words, is the intent to make it so clearly, unequivocally, and unmistakably shown by the stipulation? The defendant's stipulation was, that he would convey at any time within sixty days from the date of said agreement upon certain express conditions, one of which is, that the final payment of the purchase-money should be made within sixty days from

the date of said agreement, otherwise the "agreement to be null and void."

The contention of appellant's counsel that the general rule of equity is, that "time is not the essence of the contract," is not supported by any modern authority. The general rule, as expressed by Parsons on Contracts, and by this court in *Grey* v. *Tubbs*, 43 Cal. 359, is, that "time is not necessarily the essence of a contract." But it may be made so. Professor Pomeroy says: "It is now thoroughly established that the intention of the parties must govern; and if the intention clearly and unequivocally appears, from the contract, by means of some express stipulation, that time shall be essential, the time of completion or of performance or of complying with the terms will be regarded as essential in equity as much as at law. No particular form of stipulation is necessary, but any clause will have the effect which clearly and absolutely provides that the contract is to be void if the fulfillment is not within the prescribed time": Pomeroy on Specific Performance, 462. Among the numerous cases cited by the learned author in support of this doctrine is that of *Benedict* v. *Lynch*, 1 Johns. Ch. 370, 7 Am. Dec. 484, decided by Chancellor Kent. In that case the contract was signed by the defendant only, and he agreed to give a deed upon certain express conditions being performed by the plaintiff at the specified times, "but if he should fail in them, or either of them, the agreement to be void." The plaintiff failed to perform within the time specified, but offered to, after the expiration of that time. The opinion of the learned chancellor is the most full and satisfactory explanation of the question involved in this case that has ever fallen under our observation, but we deem it unnecessary to quote more from it than the following: "There was an express stipulation in this contract that if the plaintiff failed in either of his payments, the agreement was to be void. The first question which naturally presents itself is, whether the time was not here made part of the essence of the contract, and whether the contract did not become void on the failure of the plaintiff to make the first payment." He held that it was, and decreed accordingly. In that case the intention of the parties to make time the essence of the contract did not more clearly and unequivocally appear than it does in this case. *Grey* v. *Tubbs*, 43 Cal. 359, is in the same line as *Benedict* v. *Lynch*. In *Grey* v. *Tubbs* this court said: "Courts of equity have not the power to make contracts for parties,

nor to alter those which the parties have deliberately made; and whenever it appears that the parties have in fact contracted that if the purchaser make default in the payments as agreed upon he shall not be entitled to a conveyance, and shall lose the benefit of his purchase; and when it also appears that the purchaser is without excuse for his delay, the courts will not relieve him from the consequences of his default."

Judgment and order affirmed.

CONTRACT FOR THE SALE OF REALTY, WHEN TIME IS OF THE ESSENCE OF: See *Sowles* v. *Hall*, 62 Vt. 247; *ante*, 101, and note; *Cleary* v. *Folger*, 84 Cal. 316; 18 Am. St. Rep. 187, and note; *Cannon River Mfg. Ass'n* v. *Rogers*, 42 Minn. 123; 18 Am. St. Rep. 497, and note. Merely fixing the time for delivering the deed and paying the purchase-money does not raise the presumption that time was intended to be of the essence of the contract: *Smith* v. *Profitt*, 32 Va. 832. Time is of the essence of the contract when such is evidently the intention of the parties as shown by the provisions and stipulations of the agreement: *Woodruff* v. *Semi-Tropic etc. Co.*, 87 Cal. 276. The object of making time of the essence of the contract is to protect the vendor: *Vorwerk* v. *Nolte*, 87 Cal. 236; and upon default on the part of the vendee, the vendor may either refuse to perform the contract: *Cummings* v. *Rogers*, 36 Minn. 317; *Schmidt* v. *Williams*, 72 Iowa, 317; *Chadbourne* v. *Stockton etc. Soc.* 86 Cal. 636; or he may waive the default and enforce the contract against the vendee: *Smith* v. *Mohn*, 87 Cal. 489; *Dana* v. *St. Paul etc. Co.*, 42 Minn. 194; *Stratton* v. *California etc. Co.*, 86 Cal. 354.

[IN BANK.]

WINTER *v.* McMILLAN.

[87 CALIFORNIA, 256.]

PRACTICE ON APPEAL. — An appeal from a judgment and from an order denying a new trial may be taken by one notice by two different parties, though one of such parties appeals from the judgment only, and the notice is sufficient if it states who are appellants and what they appeal from.

PRINCIPAL AND AGENT. — An agent, though authorized to convey, cannot execute a conveyance to himself and his wife for a nominal consideration. His act is a fraud on his principal, and his conveyance is void.

CROSS-COMPLAINT MAY BE FILED BY DEFENDANT IN AN ACTION TO QUIET TITLE.

CROSS-COMPLAINT BRINGING IN NEW PARTIES. — In an action to quiet title, the defendant may bring in new parties by cross-bill, when necessary for the complete determination of the rights of the parties. Hence where the defendant claimed that H. had been the owner of the property, and while such owner had conveyed it to plaintiff, in trust, as security from loss on account of certain contingent liabilities; that H. was still in possession of the property, but that defendant had succeeded to his interest under an execution sale, — it was held that H. might be brought in by

cross-bill for the purpose of enabling the court to completely determine all the rights of all the parties, and to ascertain the extent of plaintiff's rights under the trust deed to him.

R. Percy Wright, for the appellants.

W. B. Tyler and D. H. Whittemore, for the respondent.

PATERSON, J. This action was brought against the defendant, McMillan, to quiet the title of the plaintiffs, Winter and Wright, to a lot of land in San Francisco. The defendant answered, denying that the plaintiffs were the owners of or had any interest in the land, and at the same time filed a cross-complaint which alleges, in substance, that plaintiffs never had any interest in the property, except the naked legal title, which was conveyed to them by Louis and Louise Helbing on June 3, 1881, without consideration, and with intent to hinder, delay, and defraud the creditors of said grantors; that G. Henninger and wife recovered judgment against the said Louis Helbing for the sum of three thousand five hundred dollars, and costs, November 11, 1881, in an action for damages commenced April 30, 1881; that thereafter the property in controversy was sold to defendant on execution issued on said judgment, and in due time the sheriff executed and delivered to him a deed therefor; that the deed of the Helbings to plaintiffs was given to secure the latter against any damages they might sustain by reason of their becoming sureties on a penal bond given by said Louis Helbing, but no liability was incurred by plaintiffs on said bond; that the title still stands on the records in the name of the plaintiffs, but the said Helbings have continued to hold and now are in possession of the land, claiming some interest therein; that the controversy as to the title to the land cannot be settled without having the said Helbings before the court; that defendant is the owner of the property, and entitled to the possession of the same. The prayer of the cross-complaint is, that the Helbings may be brought in by summons and required to show what right, if any, they have to the property, and for a judgment that neither plaintiffs nor the Helbings have any right, title, or interest in or to the land in controversy. By order of the court, a summons was issued and served on the Helbings, but it seems that they made no appearance. The plaintiffs filed a demurrer, which was overruled. Then they filed an answer, denying all the allegations of the cross-complaint, and alleging that Louis Helbing had never had any right, title, or

interest in the property, except such as he derived from a claim of homestead, which interest was exempt from execution and forced sale.

The court found that plaintiffs were not the owners of or entitled to the possession of the property; that the Helbings were the owners of the property on June 3, 1881, when they deeded the same to plaintiffs simply to secure them against any liability as sureties, and that no liability had been incurred on the bond; that defendant purchased the property at execution sale, as alleged by him, and is the owner thereof. Judgment was entered in accordance with the findings. Plaintiffs moved for a new trial, which motion was denied. Thereupon the Helbings united with the plaintiffs in a notice of appeal from the judgment, which notice included also a notice of appeal by the plaintiffs from the order denying their motion for a new trial.

The respondent has moved to dismiss the appeal, on the ground that the appellants could not properly unite two separate and distinct appeals in one notice and in one undertaking.

An appeal from a judgment, and from an order denying a motion for a new trial, may be taken by one notice. The notice states who are appellants and what they respectively appeal from. This is sufficient. The clerk certifies that "sufficient undertakings on appeal in due form were properly filed." There is nothing to contradict the facts tated. The motion to dismiss is denied.

It does not clearly appear what is the basis of plaintiffs' claim of title. They did not trace it back to any paramount source. The burden of showing title in themselves rested upon the plaintiffs, and they failed to make out a case. They showed that on November 10, 1879, Beta Gade gave Louis Helbing a power of attorney authorizing him to sell her real estate, and that on June 15, 1880, A. Hensler and his wife, Mary, made a quitclaim deed of the property to Beta, who was a sister of Mrs. Helbing. What connection, if any, Mary had with the title does not appear, except that she had employed Helbing to put buildings on the land in February, 1878, and the only evidence that Beta ever owned or had possession of the property is, that "she walked over it," and "looked at it." Both Beta and Mary were in San Francisco at the time of the trial in the court below, but neither was called as a witness. On June 28, 1880, Louis Helbing, acting

as attorney in fact for Beta Gade, for a nominal consideration sold and conveyed the property to himself and wife. On June 3, 1881, Beta and her husband made and delivered to plaintiffs a deed of the property, which was absolute in form, and on the same day Helbing and wife executed to plaintiffs a similar instrument. A few days later, plaintiffs and the Helbings exchanged documents acknowledging that plaintiffs held the property in trust for two purposes; viz., "to secure them against any loss which they might sustain by reason of their having become sureties on the bond above referred to, and to secure to plaintiff Wright payment for professional services which he had rendered, and should thereafter render, in certain proceedings." Plaintiff Wright did not prove what, if any, fees were due to him for services rendered. One of the bonds has been exonerated, and it does not appear that any liability has accrued on the other.

The basis of the defendant's claim of title is quite as uncertain as the plaintiffs'. The judgment under which he purchased the property at execution sale on June 9, 1884, was entered November 11, 1881. Under that purchase he took whatever right, title, and interest the Helbings had in the property at the date of the judgment. Helbing's deed of July 28, 1880, to himself and wife, is void. The power of attorney did not authorize him to give away the property, or to convey it to himself for a nominal consideration. His act was a fraud on the principal, and the conveyance is a nullity: Code Civ. Proc., sec. 2306; *Dupont* v. *Wertheman*, 10 Cal. 368; *Randall* v. *Duff*, 79 Cal. 115. It is true, the evidence tends to show that Helbing was the real owner of the property, and that the conveyances were made to mislead somebody, — probably creditors. He received but a few hundred dollars for two three-story houses. Soon after the houses were built, the Helbings went into possession of the property, and have ever since occupied the same. The plaintiffs promised to reconvey to the Helbings, — not to Beta. The Helbings then filed a homestead declaration on the property. They were heavily in debt. There are many circumstances connected with the transaction tending to show an attempt on the part of all parties to conceal the identity of the real owner. But the defendant himself offered a lease from Beta Gade to Mary Hensler, dated March 1, 1878, by the terms of which the premises were leased to the latter for a term of five years. He also offered in evidence the power of attorney from Beta Gade

to Helbing, and the deed executed by the latter to himself and wife, insisting that the latter was not void. The defendant could not thus affirm title in Beta Gade in support of his own title, and deny it in answer to plaintiffs' claim of title under the same source; he could not do so consistently, at least. If Beta was the owner of the property, the title passed to the plaintiffs herein by her deed of June 3, 1881, several months prior to the entry of the judgment against the Helbings. But as stated before, it is impossible to tell, from the evidence offered by the respective parties, what is the basis of the claim of either. The most that plaintiffs can claim, under the evidence introduced by them, is a lien for the value of services rendered by the plaintiff Wright, and for any liability which may have accrued on the bond which has not been exonerated. If Helbing was the beneficial owner at the time defendant purchased at execution sale, the latter took all his right, title, and interest, and is entitled to have the same adjudged to him. To do this it will be necessary for the defendant to amend his cross-complaint so as to state the facts more fully,—as fully as they are required in a bill in equity: *Kreichbaum* v. *Melton*, 49 Cal. 50; *Brodrib* v. *Brodrib*, 56 Cal. 563.

Plaintiffs offered to prove that Mrs. Helbing had declared a homestead on the property June 29, 1880, but the evidence was excluded. We do not think the court erred in its ruling. The fact that the Helbings claimed a homestead could not aid the plaintiffs as against the defendant. The Helbings had, by their failure to answer defendant's cross-complaint, waived, as against the defendant, any claim under the homestead declaration, and their conveyance to the plaintiffs did not give to the latter any homestead right in the property.

Appellants contend that the demurrer to the cross-complaint ought to have been sustained; that a cross-complaint is improper in actions of this kind. In support of this contention they cite *Wilson* v. *Madison*, 55 Cal. 8. All that case decides is, that where the relief demanded by defendant can be had upon the denials and averments of his answer, a cross-complaint is unnecessary. But there may be cases in which full relief cannot be given the defendant upon answer, and as in ejectment, a cross-complaint in such cases is recognized as a proper pleading, so that the whole controversy may be settled in one action, so here we see no objection to a cross-complaint upon the allegations of which, supported by proof, the

defendant may take from plaintiff that which he would recover in equity; viz., the legal title. Section 442 of the Code of Civil Procedure provides that "whenever the defendant seeks affirmative relief against any party, relating to or depending upon the contract or transaction upon which the action is brought, or affecting the property to which the action relates, he may, in addition to his answer, file at the same time, or by permission of the court subsequently, a cross-complaint. The cross-complaint must be served upon the parties affected thereby, and such parties may demur or answer thereto as to the original complaint."

Here the affirmative relief which the defendant is seeking certainly affects the property to which the action relates, and we think that the cross-complaint was a proper pleading. The plaintiffs claim the whole title. They could not maintain the action by showing simply a lien without possession or right of possession. But if the court denied their prayer because they showed at most only a lien, the validity of the lien could be determined in another action. Why not allow the defendant, upon proper averments in his cross-complaint, to test in this action the validity of the lien claimed by plaintiffs? In other states it is held that cross-complaints in these actions are proper pleadings: *Ludlow* v. *Ludlow*, 109 Ind. 199, and cases cited; *Venable* v. *Dutch*, 37 Kan. 515; 1 Am. St. Rep. 260; *Allen* v. *Tritch*, 5 Col. 228; *Greenwalt* v. *Duncan*, 16 Fed. Rep. 612.

But it is claimed that if it be conceded that a cross-complaint is a proper pleading in actions of this nature, new parties cannot be brought in by it. Whether this could be done under the old chancery practice is a question upon which the authorities are not agreed; but our code system is much broader and more liberal in this regard. The defendant is not, under our practice, confined in his cross-complaint to matters charged in the complaint. Thus in ejectment, as stated before, he may plead matters purely equitable, and secure equitable relief. Besides this, our statute provides that "when a complete determination of the controversy cannot be had without the presence of other parties, the court must order them brought in": Code Civ. Proc., sec. 389. A complete determination of this controversy, if the allegations of the defendant and the findings of the court are correct, could not be had without making the Helbings parties. The plaintiffs appeared to be and claimed to be the owners in fee. The

Helbings were in possession. The defendant was entitled to the possession if the Helbings owned the property when the judgment was entered. A trial between the plaintiffs and defendant would have settled only half of the controversy, and it would have become the duty of the court, we think, when the facts appeared in evidence, to order the Helbings brought in as parties to the action: *O'Connor* v. *Irvine*, 74 Cal. 443. In other states it is held that in a proper case third parties may be brought in to answer the defendant's cross-complaint: *Allen* v. *Tritch*, 5 Col. 228; *Bunce* v. *Bunce*, 59 Iowa, 534. Appellants rely upon the case of *Harrison* v. *McCormick*, 69 Cal. 618. In that case there was no necessity for a cross-complaint; the claim was for damages, — purely a counterclaim, — in which case, of course, the demand "must be one existing in favor of defendant and against a plaintiff, between whom a several judgment might be had in the action": Code Civ. Proc., sec. 438.

In this case a cross-complaint is proper to determine the question as to the validity of plaintiff's lien. If the obligations of the bond have ceased, and no money is due Wright for professional services, the defendant is entitled to have those facts determined, and to receive whatever affirmative relief he may prove himself in equity entitled to. If the Helbings claim a homestead upon the property, it is proper that they should be given an opportunity to present the same, so that the rights of all parties interested, or claiming an interest, may be settled in one suit.

The record shows that the summons issued on the cross-complaint was duly served on the Helbings, but is silent as to whether any appearance was made by them. We presume, of course, that no answer was filed; but if they failed to appear and demur or answer within the time allowed by law, their default therefor ought to have been entered, and a memorandum of such default indorsed on the cross-complaint: Code Civ. Proc., sec. 670.

The judgment is reversed, and the cause is remanded for a new trial, with directions to the court below to permit the parties to amend their pleadings in any respect consistent with the nature of the action.

AGENCY — VALIDITY OF AGENT'S ACTS DONE FOR HIS OWN BENEFIT. — An agent's acts are invalid, wherein he makes a profit out of his principal: *Disbrow* v. *Secor*, 58 Conn. 35; *Smith* v. *Mosely*, 74 Tex. 631. An agent to sell realty cannot sell to his wife without the consent of his principal: *Tyler*

v. *Sanborn*, 128 Ill. 136; 15 Am. St. Rep. 97, and note; and he must account to his principal for the highest price attainable: *Kramer* v. *Winslow*, 130 Pa. St. 484; 17 Am. St. Rep. 782, and note. An agent cannot bind his principal by a contract made with himself: *Williams* v. *Journal P. Co.*, 43 Minn. 537; *Third Nat. Bank* v. *Marine L. Co.*, 44 Minn. 65. Yet such contracts made with the knowledge and consent of the principal may be valid: *Francis* v. *Jacob*, 88 Ky. 525; *Miller* v. *Root*, 77 Iowa, 545. The possession of an agent is the possession of the principal: *Duncan* v. *Able*, 99 Mo. 189.

CHANCERY PRACTICE — CROSS-BILL — NEW PARTIES. — New parties who were not parties to an original bill may be brought in by cross-bill: *Hurd* v. *Case*, 82 Ill. 45; 83 Am. Dec. 249, and note 253, 254.

IN RE MCMANUS.

[87 CALIFORNIA, 292.]

EXECUTION, EXEMPTION OF PROPERTY FROM. — Statutes exempting property from forced sale should be liberally construed.

EXECUTION, EXEMPTION OF PROPERTY FROM. — The safe of a jeweler, necessary and useful in conducting his business, and without which he cannot conduct it to any profitable end, is exempt from execution as an implement of an artisan necessary to carry on his trade.

George A. Rankin, and Blackstock and Shepherd, for the appellants.

Barnes and Selby, for the respondent.

BELCHER, C. C. The respondent, L. M. McManus, was engaged in the business of a jeweler and watch-repairer, and while so engaged was adjudged to be an insolvent debtor. He owned and used in his business a jeweler's safe, which the court, against the objections of certain creditors, set apart to him as property exempt from execution.

The objecting creditors and the assignee of the estate appeal from the order, and contend that it was not authorized by law, and should therefore be reversed.

At the hearing, the respondent was called as a witness, and "testified, in substance, that he was a jeweler and watch-repairer, and is engaged in that trade or business as a means of support for himself and family, and that without the use of said safe said business cannot be prosecuted by him to any profitable end; that it is a necessary and useful article in conducting said business; that without the use of said safe his customers would not leave their jewelry and watches with him to be repaired." Another witness was also called, and testified: "That he is a practical watch-maker and jeweler; that a safe similar to the one mentioned is an article with-

out which the business of jeweler and watch-maker and watch-repairer cannot be prosecuted to any profitable end, and that such a safe is a necessary and useful article in carrying on the business of a jeweler and watch-repairer; that without the use of such a safe very few customers will leave their jewelry or watches with the artisan to be repaired."

This was all the testimony offered, and upon it the court made its findings and order as follows: "That the said safe is an article without the aid of which the business of petitioner as jeweler and watch-maker cannot be prosecuted to any profitable end, and that said safe is necessary to and in actual use by the petitioner in prosecuting his said business. Wherefore it is hereby ordered that the said safe be set apart, and that the same is hereby set apart, for the use of said insolvent debtor, and that the same shall not be subject to be applied to the payment of his debts."

Section 60 of the Insolvent Act makes it the duty of the court having jurisdiction of insolvency proceedings to exempt and set apart for the use and benefit of the insolvent such real and personal property as is by law exempt from execution. And section 690, subdivision 4, of the Code of Civil Procedure provides that "the tools or implements of a mechanic or artisan necessary to carry on his trade" shall be exempt from execution.

Statutes exempting personal property from forced sale are remedial in character, and are evidently intended to protect the debtor, and enable him to follow his vocation, and thus earn a support for himself and family. The general rule now is, that such statutes are to be liberally construed, so as to effectuate the humane purpose designed by the law-makers, and our Code of Civil Procedure declares that all of its provisions are to be so construed, "with a view to effect its objects, and to promote justice": Sec. 4.

It is difficult to define accurately the word "implements," and the courts, so far as we are advised, have never attempted to define it. Webster gives as the meaning of the word, "Whatever may supply a want; especially an instrument or utensil as supplying a requisite to an end; as the implements of trade, of husbandry, or of war"; and "utensil" he defines as "that which is used; an instrument; an implement; especially an instrument or vessel used in a kitchen, or in domestic and farming business." By the courts, these words are

accorded a broad signification, and under them many things have been exempted which are not tools.

Thus in the state of Kansas, under a statute exempting "the necessary tools and instruments of any mechanic, miner, or other person used and kept for the purpose of carrying on his trade or business," it has been held that an insurance agent and abstractor of titles could claim as exempt an iron safe and set of abstracts which were used and kept by him for the purpose of carrying on his business: *Davidson* v. *Sechrist*, 28 Kan. 324. And the same rule has been applied to a printing-press, type, and other articles used in publishing a newspaper: *Bliss* v. *Vedder*, 34 Kan. 59; 55 Am. Rep. 237.

In Illinois, it has been held that a piano used by a music-teacher, and upon which she relied for support, was within the law exempting "furniture, tools, or implements necessary to carry on his or her trade or business": *Amend* v. *Murphy*, 69 Ill. 337.

In Massachusetts, a clock, stove, screen, pitcher, and table-cover used and necessary to carry on the business of a milliner have been held to be included in "tools, implements, and fixtures": *Woods* v. *Keyes*, 14 Allen, 236; 92 Am. Dec. 765. So, also, a sewing-machine: *Rayner* v. *Whicher*, 6 Allen, 294.

In Vermont, a barber's chair has been held exempt as a tool: *Allen* v. *Thompson*, 45 Vt. 472.

In this state it has been held that an expensive thrashing outfit was not exempt under the statute exempting "the farming utensils or implements of husbandry of the judgment debtor"; but this was upon the ground that the outfit was principally used in thrashing grain raised by other persons for hire: *In re Baldwin*, 71 Cal. 74.

Other cases bearing upon the question might be cited; but we think it sufficient to refer to Freeman on Executions, 2d ed., sections 226, 226 a, and to 7 American and English Encyclopædia of Law, page 135, in both of which works the authorities are very fully collated and reviewed.

In view of the testimony submitted in this case, and the authorities above cited, we see no error in the ruling of the court below, and we therefore advice that the order appealed from be affirmed.

HAYNE, C., and VANCLIEF, C., concurred.

The COURT. For the reasons giving in the foregoing opinion, the order appealed from is affirmed.

EXECUTION, EXEMPTION OF PROPERTY FROM. — Statutes exempting property from execution are to be liberally construed: *Yates County Nat. Bank* v. *Carpenter*, 119 N. Y. 550; 16 Am. St. Rep. 855, and note; note to *McCoy* v. *Brennan*, 1 Am. St. Rep. 593; *Roberts* v. *McGur*, 82 Mich. 221; *Finlen* v. *Heard*, 126 Ill. 259. But see, *contra*, *Ivens M. Co.* v. *Parker*, 42 La. Ann. 1103.

EXECUTION, EXEMPTION OF PROPETY FROM. — The statute exempting tools, etc., used by one in carrying on his calling or trade, embraces machinery used in the manufacture of shingles: *Wood* v. *Bresnahan*, 63 Mich. 614; the stock in trade of a merchant or shop-keeper kept for the purposes of sale, to the amount in the statute specified: *Martin* v. *Bond*, 14 Col. 466; and in the case of a teamster, his wagon-sheet and six-horse lines, it appearing that he has no other lines or wagon-sheet, and that six-horse lines are useful and convenient with two horses: *In re Bowman*, 83 Cal. 153. A light two-seated vehicle owned and used by a debtor is exempt under the Minnesota statute: *Kimball* v. *Jones*, 41 Minn. 318. A commercial traveler may claim as exempt to himself from attachment a horse required for actual use in his business: *Towne* v. *Marshall*, 64 N. H. 460. So the horse, harness, and buggy of an insurance agent may be claimed as exempt, when they are used by him in carrying on his business: *Wilhite* v. *Williams*, 41 Kan. 268; 13 Am. St. Rep. 281. But it is questionable whether a race-horse is exempt from execution: *Anderson* v. *Ege*, 44 Minn. 216. A farmer may claim as exempt the property which he uses in earning a living for himself and family, and this is true, notwithstanding the fact that he does not own a farm, has not leased one, and is not engaged in farming: *Hickman* v. *Cruise*, 72 Iowa, 528. Under the Minnesota statute, a milliner's stock in trade cannot be claimed as exempt to the amount of four hundred dollars, when the articles comprising such stock are kept for sale or for manufacture, and are treated as merchandise by their owner: *Hillyer* v. *Remore*, 42 Minn. 254; but the articles manufactured wholly or partly by the milliner are expressly exempted: *Hillyer* v. *Remore*, 42 Minn. 254. A lawyer's law books are not exempt from attachment under the Rhode Island statute: *In re Church*, 15 R. I. 245. But under the Iowa code, the ordinary office furniture of a lawyer is exempt from execution: *Abraham* v. *Davenport*, 73 Iowa, 111. The law books of a deceased lawyer, who had ceased to practice his profession prior to the time of his death, cannot be included in the exempt property of his estate: *Cooper* v. *Pierce*, 74 Tex. 526. In *Pfeiffer* v. *McNatt*, 74 Tex. 640, it was decided that a member of a partnership in failing circumstances, who was also a notary public and the mayor of the village, was entitled, after failure of the firm, to the exemption of a place in which to carry on his business as a notary public and mayor. A tailor, in the prosecution of his business, may claim as exempt from execution suits of clothes, in value not exceeding $250, under the statute of Michigan: *Fischer* v. *McIntyre*, 66 Mich. 681. A peddler of bread, earning his living by the use of certain property, cannot claim such property as wholly exempt from execution against him, when his wife is a joint owner thereof with him: *Stanton* v. *French*, 83 Cal. 194.

MILLER v. HIGHLAND DITCH COMPANY.

[57 CALIFORNIA, 490.]

TORT-FEASORS ARE NOT JOINTLY LIABLE FOR DAMAGES resulting from their wrongful acts, where they act separately, and where they maintain different ditches, whereby waters are turned into a cañon, and there commingling, pass through the cañon, and flow over the plaintiff's lands, and cover it with sand and *débris*. In such a case, the several wrongdoers may be united as defendants in a suit to enjoin them from further injuring plaintiff's lands by maintaining such ditches, but cannot, in such suit, be subjected to a joint recovery for the damages which they thus occasioned.

Waters and Gird, Curtis and Otis, and George E. Otis, for the appellants.

Willis, Cole, and Craig, and Harris and Gregg, for the respondent.

MCFARLAND, J. Plaintiff was the owner of a tract of land situated about one mile southerly from the San Bernardino range of mountains. Part of the tract was in a high state of cultivation. Coming out of said mountains, and trending towards plaintiff's land, but not reaching it, is a cañon called Baldridge Cañon. The natural waters of said cañon would not flow upon plaintiff's land, but, as found by the court, "would spread out on the lower lands without cutting any particular channel, the tendency of the flow being to spread out over the said lower lands north of plaintiff's premises and become absorbed in the soil. But the defendants, by means of three different ditches, turned foreign water into said cañon, and the commingling water from said ditches passed through said cañon, and by cutting new channels, etc., flowed out and over plaintiff's land, covering part of it with sand and *débris*, and thus doing him damage. All of the ditches, however, were not owned jointly by all of the defendants. Each ditch was owned and operated by part only of the defendants, who had no interest in the other ditches, and there was no concert of action — that is, no common design — between the owners of one ditch and the owners of the other ditches. The action was brought to enjoin all the defendants from continuing the wrong, and also to recover damages jointly against all the defendants for the injury already done. The court gave judgment decreeing an injunction, and also adjudging damages against all the defendants jointly for $972.33. Defendants appeal from the judgment, and from an order denying a new

trial; and the only point they make is, that the joint judgment for damages is erroneous because there was no concurrent or joint act or negligence on the part of defendants which caused the damage.

It is clear that the rule as established by the general authorities is, that an action at law for damages cannot be maintained against several defendants jointly, when each acted independently of the others, and there was no concert or unity of design between them. It is held that in such a case the tort of each defendant was several when committed, and that it does not become joint because afterwards its consequences united with the consequences of several other torts committed by other persons. If it were otherwise, say the authorities, one defendant, however little he might have contributed to the injury, would be liable for all the damage caused by the wrongful acts of all the other defendants, and he would have no remedy against the latter, because no contribution can be enforced between tort-feasors: *Chipman* v. *Palmer*, 77 N. Y. 51; 33 Am. Rep. 566; *Little Schuylkill Nav. Co.* v. *Richards*, 57 Pa. St. 142; 98 Am. Dec. 209; *Sellick* v. *Hall*, 47 Conn. 260; Gould on Waters, sec. 222; Pomeroy on Remedies, secs. 307, 308. The case of *Blaisdell* v. *Stephens*, 14 Nev. 17, 33 Am. Rep. 523, is very similar to the case at bar, and involved the very point under discussion. In that case several defendants were sued "for wrongfully flowing waste water from their lands, to the injury of plaintiff's ditch, and for an injunction to restrain such wrongful flowing of waste water." It appeared, however, that the defendants "own, occupy, and irrigate separate and distinct tracts or parcels of land, each in his own right"; and they moved for a nonsuit upon the ground that it did not appear that the injury complained of "was the result of the joint or concurrent act of defendants." The trial court overruled the motion, and, on appeal, the supreme court of Nevada held that the nonsuit should have been granted, and said in its opinion: "The general principle is well settled that where two or more parties act, each for himself, in producing a result injurious to plaintiff, they cannot be held jointly liable for the acts of each other." On rehearing, however, it was held that the injunction against defendants was proper; but the judgment, so far as it awarded damages, was reversed.

The principle has not been changed in this state, either by statute or judicial decision. The latest authority on the point here is *People* v. *Gold Run D. & M. Co.*, 66 Cal. 138; 56 Am.

Rep. 80. That was a case where it was sought, by the equitable remedy of injunction, to restrain the commission of acts similar to those complained of in the case at bar, and the appellant sought to invoke, as against the injunction, the principle above stated as applicable to actions at law for damages. This court held, however, that the rule did not apply to the equitable remedy; but it expressly stated that it would apply to an action for damages. Counsel for appellant, in support of their position, had cited a number of cases; and in alluding to them, this court said as follows: "Each of those cases was decided upon the principle that where several persons acting independently of each other engage in the commission of wrongful acts, the torts are distinct, and not joint, and each is only severally liable for the injury caused by his own acts, and not for the torts of others with whom he was not acting in concert. There can be no doubt of the correctness of that principle, and of its applicability to an action at law for the recovery of damages for the violation of a private right." It may be contended that the earlier case of *Hillman* v. *Newington*, 57 Cal. 56, established a different doctrine; but it must be remembered that the main purpose of that action was to procure and maintain an injunction. The judgment awarded only nominal damages, — one dollar. Before that time there had been some doubt whether several wrong-doers acting independently could be joined in an equitable proceeding to procure an injunction against all; and indeed it had been once held in this state (*Keyes* v. *Little York etc. Co.*, 53 Cal. 724) that it could not be done. The language of the court in *Hillman* v. *Newington*, 57 Cal. 56, must therefore be considered as referring especially to the right of equitable remedy. There was practically no question of damages before the court, and no question was raised as to the distinction between the equitable and the legal remedy. The case is referred to in the opinion of the court in the later case of *People* v. *Gold Run D. & M. Co.*, 66 Cal. 138, 56 Am. Rep. 80, above mentioned, where *Hillman* v. *Newington*, 57 Cal. 56, is evidently considered as settling only the equitable remedy. (And of course the distinction is very plain between holding one defendant liable for the past wrongs of all the others, and simply enjoining all from committing wrong in the future.) We think, therefore, that, under the law as clearly settled, the joint judgment against the defendants for damages is erroneous.

We have considered this case somewhat at length, because

it is contended that the rule as above stated will, in some instances, work a hardship to owners of property injured by the joint consequences of acts of several persons not acting in concert. No doubt there may be cases where it would be difficult to make sufficient proof against one of such persons if sued separately. But it cannot be made clear that the opposite rule would work less wrong. At all events, we must declare the law as we find it. If the law were changed so that in a case like the one at bar a several judgment could be given against each defendant for the proportionate part of the joint damage which his individual acts had caused, it may be that such change would be in furtherance of justice. But the suggestion of such change could be properly made only to the law-making power.

The judgment appealed from, so far as it awards damages against defendants, is reversed, and in all other respects the judgment is affirmed. Let appellants recover the costs of this appeal.

Order overruling motion for new trial affirmed.

JOINT LIABILITY OF TORT-FEASORS. — In *Simmons* v. *Everson*, 124 N. Y. 319, 21 Am. St. Rep. 676, where three several owners of adjoining lots on a certain street permitted a brick wall extending along the front of their lots to remain in a dangerous condition, and a person was killed by the falling down of the wall while lawfully standing in the street, the court decided that the several owners were jointly and severally liable for the death, notwithstanding the fact that no part of the wall of one of them touched the deceased.

The general rule is, that joint tort-feasors are both jointly and severally liable for their torts: *State* v. *Boyce*, 72 Md. 149; 20 Am. St. Rep. 458. But where several distinct acts of several persons have contributed to a tortious result, and there was no concert of action, no common intent, there can be no joint liability: *Klauder* v. *McGrath*, 35 Pa. St. 128; 78 Am. Dec. 329.

DREW *v.* PEDLAR.

[87 CALIFORNIA, 443.]

OF THE RESCISSION OF A CONTRACT OF SALE for the failure of the purchaser to pay the balance of the purchase price, he is entitled to recover of the vendor all the moneys paid by him on account of the purchase, less such actual damages as may have been sustained by the vendor from the vendee's breach of contract, but such damages cannot be recouped in an action in which they are not pleaded.

LIQUIDATED DAMAGES ON FAILURE TO COMPLETE PURCHASE. — A contract for a sale, stipulating that in the event of the vendee's failure to pay the balance of the purchase price, the amount paid by him shall be re-

garded as liquidated damages for his breach of the contract, and retained by the vendor, is void in so far as it undertakes to fix such damages, and the vendee may therefore recover the amount paid by him, less the actual damages resulting from his non-compliance with his contract.

DAMAGES CAUSED BY A BREACH OF AN AGREEMENT TO PURCHASE REAL PROPERTY are, by the Code of California, deemed to be the excess, if any, of the amount which would have become due to the seller under the contract over the value of the property to him; and an agreement stipulating that a different sum shall be considered as liquidated damages for such breach is void.

DEMAND, WHEN UNNECESSARY. — IF A VENDOR ELECTS to treat a contract to purchase property of him as rescinded for the failure of the vendee to pay the balance of the purchase price, it becomes his duty to refund all money received under the contract in excess of the damages arising from its breach, and no demand need precede a suit by the vendee to recover such money.

R. B. Terry and C. W. Thomas, for the appellants.

J. R. Webb and F. H. Short, for the respondent.

VANCLIEF, C. On the twentieth day of April, 1888, the parties to this action entered into a written agreement whereby the defendants agreed to sell and the plaintiff to purchase three lots of land in the town of Fresno at the price of twelve thousand five hundred dollars, to be paid as follows: One thousand dollars upon the execution of the agreement, seven thousand five hundred dollars within sixty days from the date of the agreement, and to assume and pay a mortgage of four thousand dollars to Robert B. Thompson, and also to pay the interest on the mortgage and all taxes thereafter to become due on the land. The agreement also contains the following provision: —

"In the event of the failure to comply with the terms hereof by the said party of the second part, the parties of the first part shall be released from all obligation in law or equity to convey said property, and said party of the second part shall forfeit all right thereto, and all money paid thereon shall be as liquidated damages for the non-fulfillment hereof by the party of the second part. And the said parties of the first part, on receiving such payments at the time and in the manner above mentioned, agree to execute and deliver to the said party of the second part, or to his assigns, a good and sufficient deed conveying the said land free and clear of all encumbrances made, done, or suffered by the said parties of the first part, except as above specified.

"And it is understood that the stipulations aforesaid are to

apply to and to bind the heirs, executors, and administrators and assigns of the respective parties, and that time is of the essence of this contract."

The plaintiff paid one thousand dollars upon the execution of the agreement, but failed to pay the seven thousand five hundred dollars when the same became due, and never offered to pay the same or any part thereof until the twenty-fourth day of April, 1889 (about ten months after maturity), when he tendered full payment, and demanded a deed for the land. The defendants then refused to accept payment or to execute a deed, and also refused to refund to plaintiff the one thousand dollars paid by him upon the execution of the agreement, and elected to rescind the agreement. Thereupon the plaintiff commenced this action to recover the one thousand dollars paid by him upon the execution of the agreement, formally alleging in his complaint the facts above stated.

The defendants filed an amended answer, in which they expressly admit the execution of the contract and the payment of one thousand dollars as alleged in the complaint, but allege that they have performed their part of the contract, and that plaintiff failed and refused to pay the seven thousand five hundred dollars, or any part thereof, when the same became due, and that he abandoned the contract. They admit, however, that plaintiff made the tender of payment and demand for a deed on April 24, 1889, as alleged in the complaint. They further "allege that on the failure of plaintiff to perform his said covenants, they treated the one thousand dollars heretofore paid as forfeited, and said contract as abandoned by the plaintiff, and annulled, and that they converted the said one thousand dollars to their own use."

They further allege that "the said property had greatly increased in value between June 20, 1888, and April 24, 1889; that said increase was of the value of two thousand dollars."

They "deny that they are indebted to plaintiff in any sum, or that plaintiff has sustained any damage by reason of any act of defendants, or either of them."

To this answer the defendants added a cross-complaint, in which they set out the agreement; allege the payment of the one thousand dollars, the performance thereof on their part, the failure and refusal of the plaintiff to perform on his part, except as to the payment of the one thousand dollars; "that defendants are the owners and in possession of the land

described in said contract; that said contract is a cloud upon defendants' title to said land"; and praying that the contract be declared void and of no effect, and that it be canceled, and for such further relief as they may be entitled to.

Upon due notice, plaintiff's counsel moved for judgment on the pleadings. At the time appointed, counsel for the respective parties appeared, and plaintiff's counsel argued the motion, and it was submitted on briefs to be thereafter filed, but defendants' counsel failed to file any brief.

Some time after the expiration of the time agreed upon and allowed for filing briefs, to wit, on October 12, 1889, the court rendered judgment for the plaintiff for one thousand dollars, and interest thereon from April 24, 1889, and costs.

Thereafter, upon due notice, defendants' counsel moved the court to set aside the judgment, on the grounds, — 1. That the complaint does not state facts sufficient to constitute a cause of action; 2. That no written findings of facts were filed or made; 3. That material allegations of the complaint were denied; 4. That no answer was made to the cross-complaint; 5. That the answer stated new matter constituting a defense to the action.

At the same time, defendants' counsel made another motion to vacate the judgment, on the ground "that said judgment was made and entered against defendants through their mistake, inadvertence, and excusable neglect."

This motion was made on affidavits, in connection with which they proffered a draught of a second amended answer which they proposed to file in case the judgment should be set aside.

The following are the affidavits upon which the motion was made: —

"R. B. Terry, being first duly sworn, deposes and says that he is now, and at all times since the defendants have appeared in this action, their attorney in said matter; that when the motion heretofore made by plaintiff for judgment upon the pleadings herein was ordered submitted by the court upon briefs thereafter to be filed by counsel for plaintiff, and briefs of defendants in reply thereto, affiant, upon receiving the briefs of counsel for plaintiff, was unable to find in the city of Fresno the authorities upon which his answer to said brief would be made, and that upon an examination of said authorities at hand, affiant determined that in order that the case should be fully determined upon its merits, that he

would ask leave of the court to file a second amended answer; that so intending, he did not answer such brief.

"R. B. TERRY."

"A. J. Pedlar, being first duly sworn, deposes and says that he is one of the defendants in the above-entitled action; that the judgment herein entered on the twelfth day of October, 1889, was entered through mistake, inadvertence, surprise, and excusable neglect, and was shown in the affidavit of R. B. Terry, filed herewith.

"Affiant further says that he has fully and fairly stated the case in this action to his said counsel, R. B. Terry, who resides in the county of Fresno, state of California, and after such statement, is advised by said R. B. Terry that he has a good and substantial defense on the merits of the action, and thoroughly believes the same to be true. A. J. PEDLAR."

The proffered amended answer contained two averments in addition to the first amended answer, to the effect, — 1. That defendants had tendered to plaintiff a sufficient deed for the lots on the twentieth day of June, 1888, and at the same time demanded payment of the sum of $7,500, which, by the terms of the agreement, the plaintiff was to pay "on or before sixty days from the date" of the agreement; but that plaintiff then refused to pay said sum, or any part thereof, and thereby released the defendants from all obligations under said agreement, and thereby also released all claim to the $1,000 theretofore paid by him; and 2. That between April 20, 1888, and April 24, 1889, certain taxes and assessments amounting to $114.65 were levied upon said lots, and became due and payable, and that plaintiff never paid nor tendered them, or any part thereof, and that defendants were compelled to pay a street assessment of forty-five dollars.

The proffered answer also contained the following, which was not in the first amended answer: "Defendants deny that they, or either of them, elected to rescind said contract of sale in complaint mentioned, or that they did rescind the same, but, on the contrary, allege that plaintiff rescinded said contract and every portion thereof long prior to the twenty-fourth day of April, 1889."

The court denied the motion to set aside the judgment; and the defendants appeal from the judgment, and also from the order denying their motion, upon the judgment roll containing their bill of exceptions.

1. I think there was no error in rendering judgment on the pleadings. It clearly appears that the contract was rescinded long before the commencement of the action, and that it was so considered by both parties. Time was of the essence of the contract. Plaintiff failed to pay the seven thousand five hundred dollars on or before June 20, 1888, according to the agreement, and did not tender payment thereof until April 24, 1889, when the defendants refused to accept it and execute a deed, on the ground that plaintiff had abandoned and annulled the contract by failing to tender payment within the stipulated time, — sixty days. They say in their answer that, upon the failure of plaintiff to pay according to the terms of the contract, they treated the contract as abandoned and annulled by plaintiff, and the one thousand dollars paid as forfeited, and they do not deny the averment in the complaint that they "elected to rescind said contract of sale."

From the time defendants refused to accept payment and execute a deed (April 24, 1889), the plaintiff has considered the contract rescinded, and bases this action partly upon that ground, his complaint stating facts from which a rescission is a necessary inference. Under these circumstances, the plaintiff was entitled to recover the one thousand dollars paid by him, less such actual damages as may have been sustained by the defendants by plaintiff's breach of the contract: *Grey* v. *Tubbs*, 43 Cal. 364; *Cleary* v. *Folger*, 84 Cal. 316; 18 Am. St. Rep. 187; but such damages cannot be recouped in this action, for the reason that none such has been pleaded: *Grey* v. *Tubbs*, 43 Cal. 364; *Cleary* v. *Folger*, 84 Cal. 316; 18 Am. St. Rep. 187.

Counsel for appellants contend, however, that his clients are entitled, under the express stipulation of the contract, to retain the one thousand dollars paid as liquidated damages; whereas respondent's counsel claim that the stipulation as to liquidated damages is void. This is the principal issue presented for decision. I think the stipulation is void, under the following sections of the Civil Code: —

"Sec. 1670. Every contract by which the amount of damage to be paid, or other compensation to be made, for a breach of an obligation, is determined in anticipation thereof, is to that extent void, except as expressly provided in the next section.

"Sec. 1671. The parties to a contract may agree therein upon an amount which shall be presumed to be the amount of damage sustained by a breach thereof, when, from the

nature of the case, it would be impracticable or extremely difficult to fix the actual damage."

It appears, from the nature of the contract under consideration, that it would not be impracticable or at all difficult to fix the actual damage in this case, since section 3307 of the Civil Code provides a rule by which the damage, in all cases of this kind, may be measured and definitely fixed, as follows: "The detriment caused by the breach of an agreement to purchase an estate in real property is deemed to be the excess, if any, of the amount which would have been due to the seller, under the contract, over the value of the property to him." That is, the excess of the agreed price over the value of the property to the party who agreed to sell.

In Field on Damages, sec. 508, the rule is stated as follows: "The general rule of damages on failure of the vendee to take the property purchased, and pay for the same, would be the actual loss sustained by the vendor thereby; which would ordinarily be the difference between the actual contract price and the actual value of the land at the time of the breach, if the property shall have declined in value." See also *Eva* v. *McMahon*, 77 Cal. 467.

The defendants not only failed to plead any damages to them, but alleged in their answer an increase of two thousand dollars in the value of the property between the default of the plaintiff and their refusal to accept payment and execute a deed; and as it does not appear that plaintiff ever had possession of the property, but does appear that defendants were in possession at the time they answered, they can claim nothing for use and occupation.

No material averment of the complaint was denied. The denial of indebtedness was but a conclusion of law inconsistent with the admitted facts.

The defendants were not entitled to any affirmative relief upon their cross-complaint which they have not obtained by the judgment on the pleadings. Both the complaint and answer admitted that the agreement had been rescinded and annulled by the parties; and as the judgment on the pleadings partly rests upon that fact, it is conclusive evidence of the fact.

The agreement was not recorded, and not being acknowledged, was not entitled to record. Besides, the cross-complaint does not offer to refund the money, or any part thereof,

admitted to have been received by the defendants under the contract: *Bohall* v. *Diller*, 41 Cal. 533.

It is urged that the complaint fails to state a cause of action, in that no demand is alleged. The action is to recover money had and received by defendants to the use of the plaintiff, and it is alleged the defendants "refused and still refuse to pay to plaintiff said sum of one thousand dollars, or any part thereof." The answer admits the receipt of the money, and alleges that defendants "converted the said one thousand dollars to their own use."

From the time the defendants elected to rescind the contract, or to consider and treat it as rescinded, it was their duty to refund the money they had received under the contract, and no demand before suit was necessary: *Quimby* v. *Lyon*, 63 Cal. 394.

2. It does not appear that there was any error or abuse of the discretion of the court in overruling the defendants' motion to set aside the judgment, and counsel for appellants has not urged this point here. The averment in the proffered answer that defendants tendered to plaintiff a deed on the twentieth day of June, 1888, and demanded payment, etc., only shows that plaintiff was first in default. It does not change or dispute the fact that both parties considered and treated the contract as rescinded, as above stated, and had it been inserted in the answer on which the judgment was rendered, the plaintiff would still have been entitled to judgment on the pleadings.

I think the judgment and order should be affirmed.

FOOTE, C., and BELCHER, C., concurred.

The COURT. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

Hearing in Bank denied.

VENDOR AND VENDEE — CONTRACTS OF SALE, FORFEITURES FOR BREACH OF. — The general rule seems to be, that where parties make time for payment of purchase-money of the essence of the contract, a court of equity cannot relieve a vendee who has made default: Note to *Smith* v. *Mariner*, 68 Am. Dec. 87. Compare *Sanford* v. *Weeks*, 38 Kan. 319; 5 Am. St. Rep. 748.

A vendee may recover the purchase-money by him paid, where, through no fault of his, the vendor refuses to convey: *Pressnell* v. *Lundin*, 44 Minn. 551; but he cannot recover such money when he himself refuses to receive a deed without good cause: *Frederick* v. *Birkett*, 37 Kan. 536. A vendor of land, who has necessarily been put to expense in performing his part of the contract of sale, may recover damages on account thereof from the vendee,

who wrongfully refuses to perform the contract on his part: *Kelley* v. *West*, 36 Minn. 520.

RECOVERY OF PURCHASE-MONEY — DEMAND. — When the vendee is entitled to recover the purchase-money already paid, upon the rescission of a contract of sale, no demand is necessary before bringing a suit to recover the same: *Chatfield* v. *Williams*, 82 Cal. 519; *Jensen* v. *Weide*, 42 Minn. 59.

MOORE *v.* LONG BEACH DEVELOPMENT COMPANY.

[87 CALIFORNIA, 483.]

INNKEEPER IS NOT LIABLE FOR LOSS OF BOARDER'S BAGGAGE and other valuables by fire, not shown to have been caused by the negligence of the innkeeper or his servants.

INNS, BOARDERS AT, WHO ARE. — One who goes to an inn kept as a pleasure resort, with his wife, with the determination to remain a long time, if her health should be benefited by her residence there, and arranges for terms of entertainment by the month at rates less than those charged transient customers, and who has no other place of residence, must be regarded as a boarder, and not as a guest, for the safety of whose baggage and other valuables the innkeeper is liable as an insurer against loss by accidental fire.

Scarborough and Waterman, and Chapman and Hendricks, for the appellant.

Lee, Gardner, and Scott, and A. B. Hotchkiss, for the respondent.

FOOTE, C. The respondent contends that the statement upon motion for a new trial which appears in the transcript cannot be looked into, for the reason that it is not identified as having been used upon the hearing of the motion.

There is but one notice of appeal, and that is, both as to the judgment and the order denying a new trial. The stipulation at the end of the transcript is to this effect: "It is hereby agreed that the foregoing transcript contains a full, true, and correct copy of all papers necessary and proper to be used on this appeal; that the appeal herein was duly perfected, and the requisite deposit in lieu of an undertaking was given within the time prescribed by law; that the foregoing is a full, true, and correct transcript of the record on appeal, and that the appeal herein may be heard thereon."

If the word "appeal," as used in the stipulation, was intended to apply to both the order denying a new trial, and the judgment, then it covers the statement of the case which appears in the transcript, which is in due form, and appears

to have been settled by the judge, and filed on February 3, 1890. The order denying a new trial was made on the 17th of February, 1890.

It is plain that the appeal was taken from both order and judgment, and the stipulation evidently refers to them both, where the word "appeal" is used. Since the stipulation states that the "appeal herein may be heard" upon the record on appeal in the transcript, it is proper that the statement here, under all the facts appearing in the record, should be held as being one that can be looked into on the appeal from the order denying a new trial.

The main argument for the reversal of the judgment and order by the appellant seems to be that the evidence is insufficient to show that the plaintiff was a boarder, and not a guest, of the innkeeper who was sued, and the former contends that if a guest he is entitled to recover, but not as a boarder.

The case, as stated in the complaint, is that of an individual who goes to an inn as a guest or transient traveler, and while he is there the inn burns down, and he loses his baggage, containing wearing apparel, jewels, and other personal valuables, occasioned by the negligence of the defendant and his servants, and seeks to make the innkeeper responsible for the loss. The fire appears to have been purely accidental, and there is nothing to show that the goods lost were not under the control of the owner, kept in his rooms, or that they were ever in the manual possession of the innkeeper.

Nor is it proved or found that the fire or loss occurred by any negligence of the defendant, its servants or agents. But the plaintiff contends that an innkeeper is an insurer of the goods of his guests placed in the inn, even as against loss by fire, as well as robbery and theft, and that if they are lost or injured while there, by any of these agencies, that the innkeeper must make good the loss.

It does not seem that any case, as to such a loss by fire, has been adjudicated by the appellate court of this state. But in *Mateer* v. *Brown*, 1 Cal. 221, 52 Am. Dec. 303, and in *Pinkerton* v. *Woodward*, 33 Cal. 600, 91 Am. Dec. 657, cases where the loss to the guest seems to have been occasioned by robbery, it was held that the innkeeper was an insurer of the property committed to his care, against everything but the act of God or the public enemy, or the neglect or fraud of the owner of the property.

Conceding, therefore, without deciding, that the view urged by the appellant is the law of this state upon the matter in hand, the real question for determination here is, whether the evidence shows the plaintiff to have been a guest or a boarder. Each case, as to this point, turns upon its special state of facts. There is no doubt in our minds, upon the facts here, that the plaintiff and his family were boarders whose time of remaining at their place of sojourn depended upon their own volition. They went to the inn to ascertain if it was a place where the health of the wife of the plaintiff would be benefited, with the determination to remain there indefinitely, perhaps for a very long time, if such should be the case. But with a view, if her health did not improve, to leave at any time. It was also shown that the plaintiff, before going there with his family, had made an arrangement for terms of entertainment at a great deal less than those for a transient traveler, and by the month, and they went prepared to stay, if they desired, for a considerable time, and to enjoy all the gayeties that might take place. They had no other place of residence, and for the time being this inn was to be such, subject, as to time of stay, to their volition, but at reduced rates of board by the month.

It was evidently the hope and the expectation of the plaintiff and wife that her health would be benefited at this inn, which was a pleasure resort, its principal business season being that of the summer. And it is fair to presume that they thought it would benefit her, and went prepared to stay as permanent boarders, rather than transient travelers. These facts were known to the defendant, and with this idea in the minds of both the contracting parties, together with the fact that the plaintiff had just been boarding at another inn, at another place, and had left there some of his goods, such as he did not expect to need at the defendant's inn, and had no fixed home, and that he got reduced terms of board, and did not place his valuables in the care of the innkeeper, are very persuasive that it was the intention of all the parties that he should be a boarder, and not a mere transient traveler or guest, and, for the time being, a resident of the place where he was intending to board. Under these facts, and others appearing in the record, we cannot say that the findings of the court below are not sufficiently supported by the evidence.

We therefore advise that the judgment and order be affirmed.

BELCHER, C., and HAYNE, C., concurred.

The COURT. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

Hearing in Bank denied.

INNKEEPER'S LIABILITY FOR GUEST'S BAGGAGE AND VALUABLES: See *Wear* v. *Gleason*, 52 Ark. 364; 20 Am. St. Rep. 186, and note; *Coskery* v. *Nagle*, 83 Ga. 696; 20 Am. St. Rep. 333, and note; *Shultz* v. *Wall*, 134 Pa. St. 262; 19 Am. St. Rep. 686, and note; extended note to *Clute* v. *Wiggins*, 7 Am. Dec. 449–458.

INNKEEPERS. — As to who are guests, and when they cease to be such, see note to *McDaniels* v. *Robinson*, 62 Am. Dec. 586–592; note to *Hancock* v. *Rand*, 46 Am. Rep. 119–121.

NORDHOLT *v.* NORDHOLT.

[87 CALIFORNIA, 552.]

DEED MADE BY A MINOR IN EXECUTION OF A TRUST cannot be disaffirmed by him.

TRUST — FRAUD. — IF A SON INDUCES HIS MOTHER TO CONVEY PROPERTY TO HIM BY PROMISING that he will hold it for the benefit of, and will convey it to, another of her sons, but intending all the time to claim the whole of it for himself, equity will declare him to be a mere trustee of the legal title for the benefit of his brother to whom he promised to convey it.

PLEADING — EVIDENCE. — DURESS in the execution of a conveyance should not be permitted to be proved, unless specially pleaded.

Gage and Roberts, and Brousseau, Hatch, and Thomas, for the appellant.

Shinn and Ling, and Anderson, Fitzgerald, and Anderson, for the respondent.

VANCLIEF, C. The issues in these two actions were the same, and the actions were consolidated and tried together by the lower court on the same evidence. The court found for respondent on all the issues, and rendered judgment accordingly. The appeals are from the final judgment, and from an order denying motion for new trial.

It appears by the pleadings that the parties are brothers, and that on November 17, 1886, their mother conveyed to the respondent, William, by deed absolute on its face, expressing a nominal consideration of one dollar, an undivided fourth part of certain real property situate in the city and county of Los Angeles; that appellant, John, claimed that this convey-

was in trust for him, and demanded of William a conveyance of the legal title; that on February 10, 1887, William, who was then a minor over the age of eighteen years, conveyed to John by a bargain and sale deed, expressing a nominal consideration of one dollar, the same undivided fourth of the property; that this conveyance was claimed by appellant, John, to have been made in execution of the alleged trust. The respondent denies the trust, and seeks to avoid his deed of February 10th to John, on the ground that at the time of its execution he was a minor of the age of only eighteen years.

If the respondent took and held the legal title in trust for appellant, he cannot disaffirm or avoid his deed in execution of that trust on the ground of his minority, since the execution of the trust was a duty which a court of equity would have compelled him to perform notwithstanding his infancy: *Elliott* v. *Horn*, 10 Ala. 348; 44 Am. Dec. 488, and cases there cited; *Starr* v. *Wright*, 20 Ohio St. 97; *Prouty* v. *Edgar*, 6 Iowa, 353; Schouler on Domestic Relations, sec. 416. Therefore the respondent's right to disaffirm his conveyance of February 10th depends upon the issue as to whether he held the legal title in trust for the latter. Upon this issue the lower court found for the respondent, and the appellant contends that this finding is not justified by the evidence.

There is nothing in the deed of the mother to respondent to indicate that the conveyance was in trust; nor is the alleged trust evidenced by any written instrument subscribed by the respondent or his agent. If the trust exists, it arises from fraud, and is therefore a constructive trust, not within the statute of frauds, which may be proved by parol; and this is the theory on which the case was tried.

The evidence tended to prove that the mother, at the request of respondent, had been induced to convey the property in question to her four children; viz., respondent, appellant, and her two daughters, — one undivided fourth to each; that William (respondent) had requested her to convey to him John's fourth in trust for the latter, on account of John's dissipated habits at that time, to be reconveyed to John when he should become temperate, or when William should become twenty-one years of age; that at first the mother consented to this, and, in the absence of John, William presented to her the draught of a deed to this effect, and requested her to execute it; that she refused to execute the deed as drawn, conveying John's fourth

to William in trust; but did then (November 8, 1886) execute a deed to William and her two daughters, conveying to each one undivided fourth of the property; that afterwards (November 17, 1886), respondent again requested his mother to convey to him the other fourth in trust for John, which she then did without other consideration than the parol understanding with respondent, and his express promise to her, that he would reconvey that fourth to John as above stated; that at the time of making this promise to hold in trust and to reconvey to John, respondent did not intend to perform his promise, but intended to claim and hold that fourth absolutely for himself, as he does in these actions; that upon John's claiming and demanding of him a conveyance of that fourth, he executed the deed of February 10, 1887, but with the secret intention of thereafter disaffirming it on the ground of his minority, as he is endeavoring to do in these actions.

These facts, if proved, constitute such fraud as would justify a court of equity in declaring the respondent a mere trustee of the legal title for the benefit of the appellant: *Brison* v. *Brison*, 75 Cal. 525; 7 Am. St. Rep. 189; *Adams* v. *Lambard*, 80 Cal. 426; *Sandfoss* v. *Jones*, 35 Cal. 481. And the evidence, positive and circumstantial, on the part of the appellant, seems *prima facie* sufficient to prove them. Indeed, they seem to be supported by a decided preponderance of evidence properly admitted.

But it was claimed by the respondent on the trial, without any foundation therefor in the pleadings, that his deed to appellant of February 10, 1887, was executed under duress *per minas*, which his testimony on the trial had some tendency to prove. This testimony of the respondent as to threats by John was objected to by counsel for appellant, on the ground that it was irrelevant to any issue made by the pleadings. The objection was overruled by the court, and counsel for appellant excepted. Thereupon respondent testified as follows: "Well, at that time John thought he had a quarter-interest in this property, and he used to ask me for the property all the time. At that time he was drinking very heavily, and he told me several times if I did not give him up that property he would do me up, or something to that effect. I felt the influence of him, and I talked with Judge Ling about it, and he said if I gave him a deed I could disaffirm it after a while, and keep him quiet for the present. So with that I made a deed to him of one quarter-interest in the property.

John would speak to me about the matter on an average every other day; he would say that he had an interest, a quarter-interest, in the property, and that he wanted it, — he wanted a deed to that property."

I think the court erred in overruling the objection to this testimony, to the possible, if not probable, prejudice of the appellant. The conveyance of February 10, 1887, under the circumstances of John's claim and demand, tended to justify an inference that the respondent then recognized the trust and his obligation to convey the property to John, which corroborates and strengthens the other evidence of the trust; but if the conveyance was coerced by duress of any kind, no such inference could be drawn. Why, if respondent did not recognize the trust, did he execute the deed of February 10, 1887? This question, so pertinent under the circumstances, is answered by evidence of duress. But since the execution of the deed was expressly admitted by respondent's pleadings, and the duress sought to be proved was affirmative matter in avoidance of the deed, it should have been specially pleaded; else no evidence to prove it should have been admitted against the objection of appellant: *McCreary* v. *Marston*, 56 Cal. 403; *McCreery* v. *Duane*, 52 Cal. 262; *Miller* v. *Sharp*, 48 Cal. 394; *McComb* v. *Reed*, 28 Cal. 281; 87 Am. Dec. 115.

The only matter pleaded in avoidance of the deed is the minority of the respondent, which, we have seen, is not available if the respondent held the property in trust as alleged, and as the evidence tends to prove.

For the error in admitting respondent's testimony as to duress, I think the judgment and order should be reversed, and the causes remanded for a new trial.

BELCHER, C., concurred.

HAYNE, C. (concurring). I concur in the foregoing opinion, but go further. I think it would make no difference if the duress were pleaded in the fullest manner. The deed of the respondent can no more be avoided on the ground of duress than it can on the ground of minority. A court of equity will not lend its assistance to a man to set aside, on the ground of duress, an execution of a valid trust. That would be to assist a fraud.

This question fairly arises, and if it be not disposed of now, the case will probably come back again.

The COURT. For the reasons given in the foregoing opinion,

the judgment and order are reversed, and the causes remanded for a new trial.

Hearing in Bank denied.

INFANTS, DEEDS OF. — A deed executed by a minor, whereby, as a trustee, he conveys the naked legal title, cannot be disaffirmed by him: Note to *Craig* v. *Van Bebber*, 18 Am. St. Rep. 641, 642.

CONSTRUCTIVE TRUST — FRAUD. — PERSONS acquiring title by fraud are trustees for the injured party: *Lewis* v. *Lewis*, 9 Mo. 182; 43 Am. Dec. 540.

AVERY *v.* CLARK.

[87 CALIFORNIA, 619.]

VENDOR'S LIEN IS NOT THE RESULT OF ANY AGREEMENT OR INTENTION of the vendor and vendee, but is simply an equity raised by the courts for the benefit of the former.

VENDOR'S LIEN IS LOST BY TAKING A MORTGAGE to secure the payment of the purchase price, in the absence of an express agreement that the vendor shall not thereby lose his right to resort to his vendor's lien.

VENDOR'S LIEN IS NOT ASSIGNABLE.

VENDOR'S LIEN AND MORTGAGE FOR PURCHASE-MONEY. — When a vendor parts with title, and takes a mortgage to secure the payment of the purchase-money, in which is inserted a statement that it is given "in part payment of the purchase-money of the within secured property," these words do not preserve the pre-existing vendor's lien nor extend the lien of the mortgage by relation back to the date of the contract of sale.

MECHANIC'S LIEN IN THIS STATE RELATES TO THE DAY WHEN MATERIALS WERE COMMENCED TO BE FURNISHED by the lien-holder, and hence has precedence over a mortgage executed subsequently to that time, though given to secure a balance due on the property for the purchase price thereof.

MECHANIC'S LIEN. — Under the code of California, if a building is constructed on lands with the knowledge of a person having or claiming any interest therein, such interest is subject to such lien, unless he gives notice that he will not be responsible, and if he afterwards makes a conveyance of the property, taking a mortgage to secure the payment of part of the purchase price, his mortgage is subordinate to the mechanic's lien.

T. J. Carran and Walter Bordwell, for the appellant.

Wells, Guthrie, and Lee, C. McFarland, and Albert Crutcher, for the respondents.

HARRISON, J. This is an action for the foreclosure of a mortgage made by the defendants Humeston to one Robbins, and by him assigned to the plaintiff. The defendants, other than the mortgagors, are claimants of mechanics' liens for labor and materials furnished in the construction of a dwelling-house upon the premises described in the mortgage. Judg-

ment was rendered for a sale of the premises, and directing that out of the proceeds of the sale the claims of the respondents (McCarthy, Clark, and Humphreys) should have priority in payment over the mortgage claim of the plaintiff. From this judgment the plaintiff has appealed, upon the ground that his claim was the first lien upon the lands.

The case is here upon the judgment roll alone, and presents the following facts: September 24, 1888, A. S. Robbins, the plaintiff's assignor, being in possession of a lot of land in Los Angeles under a contract of purchase from one Griffes, who was the owner, made an agreement with the defendant Cassie M. Humeston to sell her the same for the sum of two thousand two hundred dollars, of which she then paid two hundred dollars, and took possession of the land. This agreement was never recorded. In the latter part of October of the same year, the defendant R. C. Humeston, husband of said Cassie, with her consent, and at the advice of Robbins, began the construction of a dwelling-house upon the lot, which was completed April 16, 1889. No written contract was made for the construction of the house, and its value or cost exceeded one thousand dollars.

January 5, 1889, Griffes executed to Robbins a deed of the lot, and on the same day Robbins conveyed it to Mrs. Humeston, and at the same time Mrs. Humeston and her husband gave him their four promissory notes for five hundred dollars each, for the unpaid amount of the price thereof, and executed the mortgage in question to secure their payment. Both of the deeds were recorded on the day of their date, and the mortgage two days thereafter.

March 19, 1889, the plaintiff purchased the mortgage and notes from Robbins, who on that day "assigned" them to him.

Prior to the date of this mortgage, viz., December 3, 1888, the respondents Clark and Humphreys entered into a verbal contract with R. C. Humeston to furnish lumber and other materials as might be required in the construction of the house, and between that day and April 10, 1889, furnished materials which were used in such construction to the value of $2,017, for which they afterwards filed their claim of lien. At the time of making this contract they knew that Mrs. Humeston claimed the land under a contract, and was indebted to Robbins for the purchase-money to the extent of two thousand dollars. The court does not find on what day

Clark and Humphreys commenced to furnish the materials, other than that it was "between the third day of December, 1888, and April 10, 1889"; but it is conceded in the brief of counsel for appellant that they commenced to furnish them on the third day of December, 1888.

It is contended by the appellant that by virtue of the contract of sale between Robbins and Mrs. Humeston, there was created in favor of Robbins a vendor's lien for the unpaid portion of the purchase-money, which was preserved in the mortgage that was taken at the time Robbins conveyed the property to her, and that the right to enforce this lien passed to the plaintiff by the assignment to him of the notes and mortgage, and has priority over the liens of the respondents.

A vendor's lien is not the result of any agreement or any intention of the vendor and vendee, but is a simple equity raised by courts for the benefit of the vendor of real estate. It is a privilege purely personal, and cannot exist in favor of any but the vendor. It does not exist in his favor if he has other security for the land which he has conveyed. It is not assignable, even by express contract, nor does it pass to the assignee of the vendee's obligation for the purchase-money.

It has been uniformly held in this state that this lien is lost by any act on the part of the vendor manifesting an intention on his part not to rely upon the lien, and that, although it is competent for him to take security for the payment of the purchase price of the land, and by an express agreement not lose his right to resort to this lien, yet his taking such security is *prima facie* a waiver of the lien, and, in the absence of some agreement to the contrary, the vendee will hold the land discharged from such lien. In *Hunt* v. *Waterman*, 12 Cal. 301, the vendor had taken a mortgage on the property sold for the payment of the entire purchase-money, but by reason of some defect the mortgage was unavailing as a security. He then brought an action to foreclose his vendor's lien. The court says: "The question in this case is directly presented whether in this state a vendor's lien exists when a mortgage security is taken for the purchase-money. Decisions of the various courts have been numerous on this branch of jurisprudence, and are not harmonious. The better rule, supported by the weight and number of authorities, is to hold the silent lien of the vendor extinguished whenever the vendor manifests an intention to abandon, or not to look to it; and it is held that he does this

whenever he takes other and independent security upon the same land, or a portion of the same land, or on other land. When he looks to other security, he loses this tacit lien." In *Baum* v. *Grigsby*, 21 Cal. 172, 81 Am. Dec. 153, Judge Field, delivering the opinion of the court, says: "When any other independent security is taken,—as a mortgage on the land or upon other property, or the personal responsibility of a third person,—the lien is held to be waived, unless there is at the time an express agreement for its retention. The taking of a distinct, independent security is presumptive evidence of the waiver."

It is also the established rule in this state that this lien is not assignable, and that the assignee of the right to recover the money for which the land was sold cannot enforce the lien: *Baum* v. *Grigsby*, 21 Cal. 172; 81 Am. Dec. 153; *Camden* v. *Vail*, 23 Cal. 633. In *Baum* v. *Grigsby*, 21 Cal. 172, 81 Am. Dec. 153, the court says: "The cases which deny that the lien passes with the personal security of the vendee do not rest, except in a few instances, upon the want of a special assignment from the vendor, but upon the ground that the lien is, in its nature, unassignable; and to that conclusion we have arrived. The assignee of a note given for the purchase-money has not parted with the property which he seeks to reach, in consideration of the note he has received. He has never held the property, and has, therefore, no special claims upon equity to subject it to sale for his benefit. The particular equity of the vendor in this respect cannot, in the nature of things, be asserted by another."

These principles were afterward formulated in the Civil Code, which provides: —

"Sec. 3046. One who sells real property has a vendor's lien thereon, independent of possession, for so much of the price as remains unpaid and unsecured otherwise than by the personal obligation of the buyer.

"Sec. 3047. Where a buyer of real property gives to the seller a written contract for payment of all or part of the price, an absolute transfer of such contract by the seller waives his lien to the extent of the sum payable under the contract."

Properly speaking, a vendor's lien does not exist until the vendor has parted with his title. So long as he retains the title he cannot be said to have any implied lien upon the land. The security which he then has for the purchase-money is

created by express reservation, and cannot be impaired by any act of the vendee. This is an express lien, existing by virtue of a contract executed between the parties, and is capable of assignment and enforcement by his assignee: *Taylor v. McKinney*, 20 Cal. 618. Such a lien is open and manifest to the world, and is entirely different from the secret, invisible lien which the law implies in behalf of the vendor when he parts with the title, and which is known only to the parties to the transaction, and those to whom they may communicate the fact. For such a lien equity makes no special provision, but leaves the parties to rely upon the contract which they have executed between themselves.

Whatever was the nature of the security held by Robbins prior to January 5, 1889, by virtue of the contract of sale between him and Mrs. Humeston, whether it was a vendor's lien or a lien in the nature of a mortgage, or whether, inasmuch as he did not himself have the title to the land, it was a security differing from either of these, when he took the promissory notes of Mrs. Humeston and her husband, secured by their mortgage upon the land which he then conveyed to her, he waived whatever lien he had prior to that date, and thereafter had only the lien that existed by virtue of the mortgage. The unpaid price of the land did not thereafter "remain unsecured otherwise than by the personal obligation of the buyer." In addition to her personal obligation, he had the personal obligation of her husband, together with their mortgage on the land to secure the same. By these acts his vendor's lien, if he had any, was extinguished, and his prior security was merged in the mortgage, and became an open, public, and express lien. Nor did the insertion in the mortgage of the clause, "This mortgage is given in part payment of the purchase-money of the within described property," have the effect to extend the lien, by relation, to the date of the contract of sale. These words do not constitute or imply any agreement or intention for the preservation of a prior lien. The fact that the mortgage which the vendor takes at the time of the conveyance is expressed to be for the purchase-money of the land is none the less a waiver of his vendor's lien.

The plaintiff in this case has, however, only such rights of lien upon the land as Robbins could transfer, and such as he did transfer on the 19th of March, 1889, by his assignment of the notes and mortgage. He does not in his complaint allege

any assignment to him of any other lien than was created by the mortgage, — his allegation being that "on the nineteenth day of March, 1889, for a valuable and sufficient consideration, said plaintiff purchased said mortgage and notes from said A. S. Robbins, who then and there duly assigned, transferred, set over, and delivered the same to the plaintiff"; and the finding of the court is in accordance with this allegation. We have seen above that as the assignee of Robbins he is not entitled to assert any vendor's lien in his own behalf.

Section 1186 of the Code of Civil Procedure declares that "the liens provided for in this chapter are preferred to any lien, mortgage, or other encumbrances which may have attached subsequent to the time when the materials were commenced to be furnished."

Inasmuch as the only lien which the plaintiff has is that of his mortgage, which did not attach to the land until January 5, 1889, and as the respondents commenced to furnish the materials for which their lien was allowed prior to that date, it follows that their lien was preferred to the lien of the plaintiff.

Nor do the provisions of section 2898 of the Civil Code give to the plaintiff, under the facts of this case, priority for the lien of his mortgage in disregard of this section. Section 1192 of the Code of Civil Procedure provides that "every building constructed upon any lands with the knowledge of the owner, or the person having or claiming any interest therein, shall be held to have been constructed at the instance of such owner or person having or claiming an interest therein, and the interest owned or claimed shall be subject to any lien filed in accordance with the provisions of this chapter," unless such person shall give notice that he will not be responsible for the same. Not only did Robbins fail to give any such notice, but the court finds that he "consented to and advised the construction of said dwelling-house." Although he was not the "owner" of the lands until January 5, 1889, yet by virtue of his contract with Griffes, he was until that date, and for several months prior to the time when the respondents began to furnish materials, a "person having or claiming an interest therein," and that interest, to its entire extent, became subject to their lien.

The principle upon which liens are allowed in favor of mechanics and material-men is, that their labor and materials have given value to the buildings upon which they have been

expended, and that it is inequitable that the owner of the land, who has contracted with them for such improvement, or who has stood by and seen the improvement in progress without making any objection, should have the benefit of their expenditures without making compensation therefor. Even in the absence of the foregoing provisions of the code, it would be in contravention of well-established rules if, under the facts of this case, the lien of Robbins should have priority over that of the respondents. Having advised the construction of the dwelling-house upon land then owned by him, under the most elementary principles of equity he would not be permitted to avail himself of this increased value for the purpose of enhancing his own security at the expense of those who had themselves given value to the land.

There was no error in allowing to Clark and Humphreys as a portion of their claim the sum of $190 for certain glass used in the building. The court found that Clark and Humphreys furnished to the defendant R. C. Humeston materials of the value of $2,037.84, to be used in the construction of the dwelling-house, and that "of and included in said amount is a claim for glass, amounting to $190, furnished by the firm of Schlesinger and Goldwater," and that Schlesinger and Goldwater refused to deliver the same until paid for. The court does not find that Schlesinger and Goldwater furnished the glass to Humeston, but does find that the material furnished by Clark and Humphreys to Humeston was of the above value, and that included in this amount was this claim for glass which Schlesinger and Goldwater refused to deliver until paid for, and that Clark and Humphreys paid Schlesinger and Goldwater for the glass. These findings are entirely consistent with the fact that Clark and Humphreys agreed with Humeston to furnish the glass for the dwelling-house, and for that purpose bought the same from Schlesinger and Goldwater, but that Schlesinger and Goldwater refused to deliver the glass to them until it was paid for, and that thereupon Clark and Humphreys paid for the glass, and furnished it according to their contract with Humeston. As the appeal is taken upon the judgment roll without any bill of exceptions, we must assume that the evidence was sufficient to support all the findings of the court.

The foregoing principles, which give priority to the lien of Clark and Humphreys, are also applicable to the lien of McCarthy. We cannot say that the description of the land in

the claim of lien filed by him is not "sufficient for identification": Code Civ. Proc., sec. 1187.

The judgment of the court below is affirmed.

PATERSON, J., and GAROUTTE, J., concurred.

Hearing in Bank denied.

VENDOR AND VENDEE. — WHAT IS A VENDOR'S LIEN: See note to *Schnebly* v. *Ragan*, 28 Am. Dec. 199. Upon the conveyance of land, the purchase-money not being paid, and no distinct security for its payment being taken, a constructive trust arises, the vendee being considered as trustee of the land for the vendor until the purchase-money is paid, and thus an equitable lien accrues to the vendor: *Acton* v. *Waddington*, 46 N. J. Eq. 17; and the lien is in the nature of a mortgage, and must be for some certain amount: *Balow* v. *Farmers' etc. Ins. Co.*, 77 Mich. 540. In *Richards* v. *Arms etc. L. Co.*, 74 Mich. 57, it is decided that equity will not raise a vendor's lien where there was no agreement for a lien between the parties. In North Carolina, the doctrine of the vendor's lien does not prevail: *Peck* v. *Culberson*, 104 N. C. 425.

VENDOR AND VENDEE. — VENDOR'S LIEN, HOW LOST: See note to *Burgess* v. *Fairbanks*, 17 Am. St. Rep. 232; note to *Schnebly* v. *Ragan*, 28 Am. Dec. 199 et seq. The lien is waived *pro tanto* by accepting the note of a third person for a part of the purchase-money: *Wisconsin etc. Bank* v. *Filer*, 83 Mich. 493. So the lien may be lost by mingling the debts secured thereby with other debts: *Erickson* v. *Smith*, 79 Iowa, 374. The insolvency of the vendee does not extinguish the vendor's lien, which is based not merely upon an equity, but upon a contract between the parties which is enforceable: *Davis* v. *Eagleson*, 79 Iowa, 270.

VENDOR AND VENDEE — ASSIGNABILITY OF THE VENDOR'S LIEN. — The general rule is, that a vendor's lien is not assignable: *Soule* v. *Hurlbut*, 58 Conn. 511; *Gruhn* v. *Richardson*, 128 Ill. 178; *Law* v. *Butler*, 44 Minn. 482; note to *Schnebly* v. *Ragan*, 28 Am. Dec. 199 et seq. But where one sells realty to another, and the purchase-money is paid by a third person, to whom the vendee gives a note for the purchase-money, reserving a vendor's lien, such note and lien are good in the hands of the third person: *Johnson* v. *Townsend*, 77 Tex. 640. In Alabama, under the provisions of the statutes, a vendor's lien may pass to a transferee of the purchaser's notes by delivery only, without any indorsement or assignment in writing: *Jones* v. *Lockard*, 89 Ala. 575.

MECHANICS' LIENS. — The lien of a mechanic or of a material-man begins with the commencement of the work or furnishing the material under an express or implied contract with his employer, and attaches upon whatever estate the latter owns at the commencement of the work or the furnishing the materials, and takes precedence over all after-acquired liens, and any prior liens of which the mechanic or material-man had neither actual nor constructive notice: *Tritch* v. *Norton*, 10 Col. 337; *Trammel* v. *Mount*, 68 Tex. 210; 2 Am. St. Rep. 479, and note; *Baker* v. *First Nat. Bank*, 77 Iowa, 616; *Lindsay* v. *Gunning*, 59 Conn. 296. Mechanics' liens take precedence over each other in the order in which they are filed: *Robertson* v. *Barrack*, 80 Iowa, 538. For the rule in Iowa as to subsequent mortgages made to a mortgagee in good faith, who had no notice of an intention to file a me-

chanics' lien on the part of the mechanic, see *Gilbert* v. *Tharp*, 72 Iowa, 714. In *Franklin etc. Bank* v. *Taylor*, 131 Ill. 377, it is held that a mechanic's lien attaches when the contract is made with the owner of the property, and if a trust deed under which the property is held prohibits the creation of any lien thereon in respect to improvements put upon the property, such restriction is enforceable, and no lien can be placed thereon.

MECHANIC'S LIEN. — As to what estates and interests can be affected by a mechanic's lien, see note to *Lyon* v. *McGuffey*, 45 Am. Dec. 678–680; *Paulsen* v. *Manske*, 126 Ill. 72; 9 Am. St. Rep. 532, and note 537, 538. In New Jersey, mechanics' liens extend only to legal estates, not to equitable interests: *Dalrymple* v. *Ramsey*, 45 N. J. Eq. 495; *contra*, *Weaver* v. *Sheeler*, 124 Pa. St. 473.

[IN BANK.]

IN THE MATTER OF AH YOU, ON HABEAS CORPUS.

[88 CALIFORNIA, 99.]

MUNICIPAL CORPORATIONS — ORDINANCE, WHEN UNREASONABLE. — MUNICIPAL ORDINANCE PERMITTING A FINE NOT exceeding one thousand dollars to be imposed as a penalty for visiting a house of ill-fame, and also an imprisonment not exceeding six months, is unreasonable, not in harmony with the laws of the state, and therefore void, when those laws do not prescribe any penalty for this offense, and make the penalty for living in and about such a house imprisonment not to exceed ninety days, and for the keeping of such a house imprisonment not exceeding six months, or a fine not exceeding fine hundred dollars, or both.

Louis E. Phillips, for the petitioner.

William S. Barnes, for the respondent.

HARRISON, J. The petitioner was convicted in the police court of the city and county of San Francisco of a misdemeanor, for visiting a house of ill-fame, and on the seventh day of March, 1890, was sentenced to "pay a fine of four hundred dollars, and in default of payment thereof, that he be imprisoned in the county jail of said city and county at the rate of one day for each one dollar of fine until said fine is satisfied." Under a commitment issued upon this judgment he was immediately taken into the custody of the sheriff, and has since that day been confined in the county jail of San Francisco.

Section 33, order No. 1587, as amended by order No. 1955, of the board of supervisors of the city and county of San Francisco, under which his conviction was had, is as follows: "It shall be unlawful for any person in the city and county of San Francisco to keep or maintain, or become an inmate of, or a visitor to, or in any manner to contribute to the support of, any disorderly house, or house of ill-fame, or place for

the practice of gambling, or knowingly let or underlet or transfer the possession of any premises for use by any person for any of said purposes. Every person who shall violate any of the provisions of this section shall be deemed guilty of a misdemeanor, and punished by a fine of not less than twenty dollars, or imprisonment not less than ten days."

The maximum amount of the punishment for this offense is not defined, but is left to the discretion of the court, except as it is qualified by the provisions of section 1 of order 1587, which reads as follows: "Any person violating any of the provisions of this order shall be deemed guilty of a misdemeanor, and be punished by a fine not exceeding one thousand dollars, or imprisonment not exceeding six months, or by both such fine and imprisonment."

Construing these two sections together as defining the extent of the punishment by fine for the offense, it results that the ordinance provides that the penalty for visiting a house of ill-fame shall be not less than twenty dollars, nor more than one thousand dollars.

Municipal ordinances must be reasonable, and the penalties prescribed for their violation must also be reasonable as well as definite. It is not essential, however, that the precise amount of the penalty for each offense shall be designated in the ordinance. It is sufficient if it be left to the discretion of the court, within fixed, reasonable limits. The maximum limit must, however, be reasonable: Dillon on Municipal Corporations, secs. 338, 341.

The legislature (Stats. 1861, p. 552) has given to the city and county of San Francisco power "to determine the fines, forfeitures, and penalties that shall be incurred for the breach of regulations established by its board of supervisors," with the maximum limit of one thousand dollars, or six months' imprisonment, or both. But it does not follow that the city is authorized to affix this maximum penalty for the violation of every regulation that it may establish under its general power to define offenses, and prescribe penalties therefor. It is not justified in prescribing the same penalty for each offense which it may define. Penalties should be prescribed with reference to the offenses which are committed, rather than to the power under which they may be prescribed. This power to "determine" the penalties which shall be incurred for the breach of its regulations has been conferred upon the city, and must be exercised by its board of super-

visors, and not left to the discretion of the judge before whom the offense is tried: *Matter of Frazee*, 63 Mich. 408; 6 Am. St. Rep. 310. The board of supervisors must itself fix, within limits which are reasonable, the penalty to be incurred for the violation of each offense. If, however, the board of supervisors does not determine the penalty in any other terms than that it shall not be less than twenty dollars, but leaves to the judge the power to affix the maximum amount of punishment which the legislature has authorized to be affixed for the violation of any offense, instead of fixing the penalty within reasonable limits, it gives to the judge the discretion of determining what the penalty shall be for each offense. This has the same effect as if it had itself fixed the maximum limit of the penalty at one thousand dollars. But a municipal ordinance which should prescribe a fine of one thousand dollars, or even four hundred dollars, as the penalty for visiting a house of ill-fame, would be not only unreasonable, as imposing a punishment greatly disproportionate to the offense, but would also be inconsistent with the general principles of the Penal Code upon kindred topics.

In the exercise of the power conferred upon it to "regulate all practices which are contrary to public order and decency," by virtue of which this ordinance was adopted (Stats. 1863, p. 540), it was incumbent upon the city to frame the ordinance, so far as practicable, in harmony with the general laws of the state: *Ex parte Kearny*, 55 Cal. 225; Dillon on Municipal Corporations, sec. 319.

The act of which the petitioner was convicted is not enumerated among the crimes which are defined in the Penal Code, but is made an offense solely by virtue of the ordinance. The legislature has not deemed it necessary to prescribe any punishment therefor, and from the statutes which it has adopted upon kindred topics, the penalty allowed by the ordinance in question must be held to be not in harmony with its general policy. By the provisions of section 647 of the Penal Code, a person "who lives in and about houses of ill-fame" is punishable only by imprisonment in the county jail not exceeding ninety days; and by section 315 of that code the extent of punishment to be inflicted upon the person who "keeps" a house of ill-fame is limited to imprisoment in a county jail not exceeding six months, or a fine not exceeding five hundred dollars, or both.

We are of the opinion that so much of the ordinance in ques-

tion as permits a fine of one thousand dollars to be imposed as the penalty for visiting a house of ill-fame is unreasonable, and not in harmony with the laws of the state, and therefore void. The petitioner must therefore be discharged from custody.

It is so ordered.

McFARLAND, J. (concurring). I concur in the order discharging the petitioner, upon the ground that under a penal statute or ordinance imposing imprisonment not exceeding a certain term or fine, or both, a defendant cannot be kept in jail under the pretense of enforcing the fine for a term longer than the maximum term of imprisonment prescribed by the statute. This has always been my opinion. In this case the petitioner should have been discharged at the end of six months, which is the maximum term of imprisonment prescribed. Under the other view (if the ordinance be valid), the petitioner could have been fined one thousand dollars, and in default of payment sent to jail for one thousand days, which, under the circumstances, would have been still more cruel and absurd.

MUNICIPAL CORPORATIONS. — ORDINANCE, REASONABLENESS OR UNREASONABLENESS OF, how determined: *People* v. *Armstrong*, 73 Mich. 288; 16 Am. St. Rep. 578, and note.

A by-law of a town not consistent with the general laws of the state is void: *Robinson* v. *Mayor*, 1 Humph. 156; 34 Am. Dec. 625, and note 633.

A municipal corporation's power to pass ordinances must be exercised reasonably, and in perfect subordination to the constitution and general laws of the land: *City of St. Paul* v. *Laidler*, 2 Minn. 190; 72 Am. Dec. 89. An ordinance, to be valid, must be reasonable, and not oppressive, its validity being for the determination of the court: *Village of Hyde Park* v. *Carton*, 132 Ill. 100.

[IN BANK.]

DONAHUE *v.* MEISTER.

[88 CALIFORNIA, 121.]

JURY TRIAL. — ISSUES RESPECTING THE LEGAL TITLE TO LAND were triable at law at the time the constitution was adopted, and either party is therefore entitled to a jury trial thereof under the provision of the state constitution declaring that the right of trial by jury shall be secured to all, and remain inviolate.

JURY TRIAL IN SUITS TO QUIET TITLE. — Under the provision of the code authorizing any person claiming title to real property to maintain an action against an adverse claimant thereof to determine their conflicting claims of title, either party is entitled to trial by jury, if the answer avers that defendant was wrongfully in possession and was ousted by the plaintiff and wrongfully kept out of possession.

MINING LAW — NOTICE NOT CONSPICUOUSLY POSTED. — If the proceedings for locating and working a mining claim are in all respects regular, they will not be held void because notice of the location was written on a paper folded with the writing inside, and placed upon a mound of rocks, underneath two flat stones, with only the margin of the paper exposed to view, though the law requires that such notice be posted conspicuously in a conspicuous place upon the claim, if the object in posting the notice as it was posted was, not to conceal, but to protect it from the weather.

T. S. Ford, for the appellant.

John Caldwell, for the respondent.

MCFARLAND, J. This is, in form, an action under section 738 of the Code of Civil Procedure to quiet title to a certain quartz-mining claim and land called by plaintiff the "Uncle Sam" claim. The complaint is in the usual form, and contains an averment that plaintiff is in possession of the premises in contest. In the answer, all the averments of the complaint are denied, except that of possession. It is further averred in the answer that the south half of said Uncle Sam claimed by plaintiff is identical with the north half of a quartz-mining claim called the "Waldeck," belonging to defendant; that defendant is entitled to the possession of said south half of said Uncle Sam, and "was lawfully possessed thereof" for several years next preceding April 6, 1889; that on said April 6th "the plaintiff wrongfully and unlawfully entered thereon" and ousted defendant therefrom, and that plaintiff wrongfully withholds the same from defendant. In the prayer of the answer, the defendant asked, in addition to general relief, that he "be restored to the possession of that part of the Waldeck ledge described as being in controversy." At the proper time defendant demanded a jury "on the issue raised by his said averments of prior possession and ouster"; the plaintiff opposed the demand, because the case was a proceeding in equity; and on that ground the court refused a jury. The court then proceeded to try the case; and after making certain findings, rendered judgment against defendant, from which he appeals. And the first point made by appellant is, that the court erred in denying his demand for a jury. We think that in this contention appellant is right.

It is quite clear that the legislature, by the mere device of adding new cases to those of a class to which former equitable remedies were applicable, cannot encroach upon that

provision of the state constitution which says that "the right to trial by jury shall be secured to all, and remain inviolate." And section 738 of the code must not be construed as intending to violate that provision of the constitution, unless such construction be unavoidable. Issues about titles to land, such as those presented by the answer in the case at bar, were triable at law at the time the constitution was adopted, and therefore either party has the right to have such issues tried by a jury: *Tabor* v. *Cook*, 15 Mich. 322. And section 738 need not be construed as attempting to take away that right. The main effect of said section is to give parties the right to compel others, by suit, to litigate and determine controversies in cases where such right did not before exist; but if in such a suit issues arise which are clearly legal and cognizable in a court of law, the code does not take away the right to have such issues tried by a jury. Formerly an action like the one at bar could not have been maintained at all; plaintiff would have been compelled to wait until the defendant chose to disturb his possession by an action. The code enabled one in his position to commence the legal contest; but when he thus brings a defendant into court he must be prepared to meet any pertinent issues which the latter may tender, and to try them in the way in which the defendant has the right under the constitution to have them tried.

The nature of the action to quiet title before and after the code provision is clearly stated by Field, C. J., in *Curtis* v. *Sutter*, 15 Cal. 262. At that time the provision of the statute was substantially as it is now, except that the plaintiff was required to be in possession. The learned judge says: "This statute enlarges the class of cases in which equitable relief could formerly be sought in the quieting of title. It authorizes the interposition of equity in cases where previously bills of peace would not lie. Such bills were of two classes. Those of one class lay where the right which the plaintiff asserted was controverted by numerous persons holding distinct and separate interests depending upon a common source. A right of fishery asserted by one party, and controverted by numerous riparian proprietors on the river, and the right to tithes claimed by a person and controverted by his parishioners, are instances cited by Story where a bill of this nature would lie. Bills of the other class lay where the plaintiff was in possession of real property, and his possession had been disturbed by legal proceedings in which his title had been successfully main-

tained. To the prosecution of bills of this latter class, the concurrence of three particulars was essential: the possession in the plaintiff, the disturbance of that possession by legal proceeding on the part of the defendant, and the establishment of the right of the plaintiff by judgment in his favor in such proceedings: *Shepley* v. *Rangely*, Davis, 249. The necessity of bills of this class naturally arose from the nature of the action of ejectment, which being founded on a fictitious demise between fictitious parties, a recovery therein constituted no bar to another action. Thus the successful party might, by repeated actions, be subjected to vexatious and harassing litigation, and to procure repose, courts of equity interpose and finally determine the controversy. It was in this way, only, that adequate relief could be administered: *Devousher* v. *Newenhem*, 2 Schoales & L. 208; *Welby* v. *Duke of Rutland*, 6 Brown Parl. C. 575. Under the statute of this state it is unnecessary for the plaintiff to delay seeking the equitable interposition of the court, until he has been disturbed in his possession by the institution of a suit against him, and until judgment in such suit has passed in his favor. It is sufficient if whilst in the possession of the property, a party out of possession claim an estate or interest adverse to him. He can immediately, upon knowledge of the assertion of such claim, require the nature and character of the adverse estate or interest to be produced, exposed, and judicially determined, and the question of title be thus forever quieted. It does not follow from the fact that the suit is brought in equity that the determination of questions purely of a legal character in relation to the title will necessarily be withdrawn from the ordinary cognizance of a court of law. The court sitting in equity may direct, whenever in its judgment it may become proper, an issue to be framed upon the pleadings and submitted to the jury. Upon the verdict of the jury, if a new trial be not granted, the court will then act, by either dismissing the bill or by adjudging the adverse estate or interest claimed to be invalid and of no effect, and awarding a perpetual injunction against its assertion to the property in question. There is no difficulty in so conducting a suit, under the statute, as to fully protect the legal rights of the parties, and at the same time to secure the beneficial result afforded by a court of equity in bills of peace, which is, repose from further litigation."

In *People* v. *Center*, 66 Cal. 551, which was an action like the one at bar, the court refers to *Curtis* v. *Sutter*, 15 Cal. 262,

and says: "It may be the original defendants herein would have been entitled to demand a jury to try the legal issue as to the right of possession, but a jury was expressly waived." And there is the same intimation in *Hyde* v. *Redding*, 74 Cal. 497. Counsel have not called our attention to any cases in this state where the point now under discussion has been clearly decided adversely to appellant's contention, although cases can no doubt be found where the court, not having its attention closely called to the subject, has assumed that the proceeding under the code is an equitable action, and referred to the general rule that courts of chancery need not call upon juries for assistance. But it is clear that the right to a jury trial cannot be avoided by merely calling an action equitable. If that were so, the legislature, by providing new remedies and new kinds of judgments and decrees in form equitable, could in all cases dispense with juries, and thus entirely defeat the constitutional provision on the subject. In *Hyde* v. *Redding*, 74 Cal. 497, the court intimates that the proceeding under section 738 of the code may be either a suit in equity or an action at law. It is really a statutory action. The code confers equitable rights so far as it grants the power to maintain the action at all, and the decree is in form equitable; but if it has to deal with ordinary common-law rights clearly cognizable in courts of law, it is to that extent an action at law. And the proper course to be pursued in such a case is clearly pointed out by Judge Field in *Curtis* v. *Sutter*, 15 Cal. 262.

The point here involved has been more thoroughly considered by the supreme court of Pennsylvania than in any other tribunal to which our attention has been called. In that state, the legislature attempted in several different acts to avoid the right of trial by jury by providing new proceedings in equity for the determination of issues which parties clearly had the right to have determined by courts of law and juries, and in every instance the court held either that the act was unconstitutional, or that it should be so construed as not to cut off the right of trial by jury. In one of those cases, the court, in commenting on the attempt above stated, say: "If this could be done, there is not an ejectment in the common-law courts which, by the inversion of parties, could not be brought into a court of equity": *Haine's Appeal*, 73 Pa. St. 172. In another case, the court, speaking of the provisions of the constitution, say: "It cannot mean that the legislature may confer upon the supreme court and the courts of com-

mon pleas the power of trying according to the course of chancery any question which has always been triable according to the course of law by a jury": *Norris's Appeal*, 64 Pa. St. 281. In another case, the court say: "An act of the assembly transferring any part of the jurisdiction of the common-law courts to a court of chancery would be unconstitutional": *Tillmes* v. *Marsh*, 67 Pa. St. 508. The limits of this opinion will not allow more extended quotations from other cases; but the point will be found to be fully discussed and pointedly decided in *North Penn. Coal Co.* v. *Snowden*, 42 Pa. St. 488; 82 Am. Dec. 530; *Norris's Appeal*, 64 Pa. St. 275; *Haine's Appeal*, 73 Pa. St. 169; and *Tillmes* v. *Marsh*, 67 Pa. St. 507.

In the case at bar, according to the verified answer, defendant was entitled to possession, and was in the possession of the disputed premises a short time before the commencement of the action, and was ousted by plaintiff. If, under these circumstances, defendant had commenced an action against plaintiff to recover possession, it would have been conceded by all that either party would have been entitled to a jury trial. But it is equally clear that plaintiff, by first bringing suit, and thus inverting the parties, could not deprive defendant of his right to a jury. If it were not for the provision of the code, plaintiff would have been compelled to wait until defendant commenced his action, and then there would have been no question about the right to a jury; but while the legislature had the power to grant the plaintiff the privilege of himself commencing the suit, it had not the power to give him, and we think did not intend to give him, the privilege of thus depriving defendant of his constitutional right.

We have discussed this point somewhat at length because there is a growing tendency to resort to the statutory action to quiet title when other actions would be more appropriate; and it is well to consider the general nature of the proceeding. But as other difficult questions may hereafter arise where this form of action is used, it is proper to say that the decision in the case at bar rests upon the facts of the case. It is decided here only that where the answer shows that the defendant was rightfully in possession, and was ousted by plaintiff and wrongfully kept out of possession, upon the trial of those issues the defendant is entitled to a jury trial.

For the reason above given, the judgment must be reversed:

but as there may be another trial of the case, it is necessary to notice another point made by appellant.

2. As we understand from the findings, the court rendered judgment against defendant solely upon the ground that the original notice of location which defendant put on the Waldeck claim on October 7, 1886, — nearly three years before plaintiff's location, — was entirely invalid, and all acts done afterwards worthless, because it was not posted in a proper manner. The court found that there was a local mining custom in the district that all notices of location of quartz claims should be in writing, and "posted conspicuously in a conspicuous place upon the claim located, at or near the lode line of said claim, and recorded in the office of the county recorder of said Nevada County." We gather from the findings that defendant's notice was in due form, and was put upon the lode line, and was duly recorded; that they properly marked their boundaries; that they performed annually upon the claim the amount of labor required by law, and on that part of the claim which is in dispute; that their location was made in good faith; and that from October 7, 1886, to April, 1889, — the time when plaintiff's location was made, — they "in all other respects complied with law and custom except as to the manner of posting the notice." The notice was placed on the claim in this way: It was written on one side of a sheet of paper, which was folded, with the writing inside, and placed upon a mound of rocks three feet high, and upon the notice were placed two flat rocks, so that about three fourths of an inch of the margin of the paper was exposed to view, the rest of the paper being obscured by the two stones which covered it. For this reason the court held that the notice was not conspicuously posted, and that therefore the entire location was void. In so holding, the court, we think, erred. It was not found that the notice was so placed for the purpose of concealing it; but it was found that the location was made in good faith, and that "in posting said notice, defendant, Meister (who posted the same), intended protecting it from the weather, and had made prior locations the same way." It is further found that "other devices were resorted to by miners to protect the notices from the weather, such as covering the notice with glass, or folding it in a box and placing the box in a conspicuous place."

If the plaintiff had attempted to relocate the claim immediately after defendant's notice had been placed there, and

before defendant had done further acts of possession, and before there had been any legislation by Congress upon the subject, and the only question had been as to the sufficiency of the posting, still, we think, that the posting, as shown by the findings, would have been sufficient. A substantial compliance with mining customs, where good faith is shown, is certainly sufficient. It appears that various devices were resorted to by miners in the district to protect their notices from the weather. The method which defendant adopted is certainly not more objectionable than "folding it in a box." An artificial mound of rocks on the line of a lode is a conspicuous object, which would naturally attract the attention of one seeking information as to a former location of the lode, and the slightest examination of the mound would result in the discovery of the written notice. Plaintiff should have seen it, and if he did see it, and had the actual knowledge which it gave, but concluded to take advantage of what he deemed a defect in the manner of posting, the technical point which he thus made is entitled to but little consideration. It does not appear how much labor and money defendant expended on his claim during the several years preceding plaintiff's entry, except that he expended more than was necessary to comply with the law; but if he had expended large sums of money in developing the mine, and had sold interests to others at high prices, the proposition to forfeit it all because he partly covered his original notice with two stones to protect it from the weather would, we think, have appalled either judge or jury.

But the above view is greatly strengthened when we reflect that under the laws of Congress the original notice cuts but little figure, after the other acts necessary to the valid location of the mining claim have been done. The notice is valuable chiefly as a temporary protection to the locator while the other acts are being performed. Under the law of Congress, "distinctly marking the location upon the ground so that the boundaries may be readily traced" is necessary, and is the main act of original location: *Holland* v. *Mount Auburn G. Q. M. Co.*, 53 Cal. 149. In *Gleeson* v. *Martin White M. Co.*, 13 Nev. 464, Beatty, J., delivering the opinion of the court, speaks of Congressional legislation on the subject as introducing "a system in which the preliminary posting and recording of notices is entirely out of place, except as a means of protecting a claim during the time necessary for tracing the ledge

and marking the boundaries of the location. When the location is thus marked, all that the notice and record were ever intended or expected to accomplish is effected in a manner far more satisfactory and complete." We quote the above remarks, not to the point that a mining custom requiring the posting of a notice in a particular way can be wholly disregarded (which is not necessary here to be decided), but as showing additional reasons why such a custom, when invoked years after all other acts of location have been done, should receive a liberal and not a strict construction. Our conclusion is, that — whatever evidence may be presented on another trial — under the facts as shown in the findings before us, the posting of defendant's original notice should be held to have been a substantial and sufficient compliance with the said custom.

The judgment is reversed, and the cause remanded for a new trial.

JURY TRIAL, RIGHT OF. — All issues of fact must be tried by a jury, if either party desires it: *Scott* v. *Nichols*, 27 Miss. 503; 61 Am. Dec. 503.

MINING LAW — NOTICE OF LOCATION — LIBERAL CONSTRUCTION. — Notices of location are to be liberally construed: *Carter* v. *Bacigalupi*, 83 Cal. 187.

HAWTHORNE *v.* SIEGEL.

[83 CALIFORNIA. 159.]

MEASURE OF DAMAGES. — IF THE LESSEES OF PREMISES have acquired a hot-water privilege for use in connection with the business carried on by them, the loss of such privilege is a proper subject for compensation in an action by them against their lessor for trespass committed by him in breaking into and forcibly altering the leased premises so as to unfit them for their business.

MEASURE OF DAMAGES. — IN AN ACTION BY LESSEES AGAINST THEIR LESSOR for his wrongful act in entering upon the leased premises and making alterations therein, no error against him is committed by instructing the jury that the damages recoverable by plaintiffs for any loss suffered by them which rendered their leasehold interest wholly or in part worthless, occasioned by the wrongful acts of the defendant, must be measured by the whole duration of such lease under the terms thereof, and the length of time which it had been enjoyed by them to the time of the reception of the injury, and by the value of such advantages as accrued to them under the lease, which grew directly out of their interest therein, not including anything which resulted from the loss of hot-water rights or established trade or business.

MEASURE OF DAMAGES. — DAMAGES WHICH ACCRUE SUBSEQUENTLY to a tort, and of which it is the primary cause, are not separate causes of action, but are parts of the tort itself, for which a cause of action is given.

MEASURE OF DAMAGES. — EXPENSES OF REMOVAL TO ANOTHER PLACE OF BUSINESS, and damages resulting from being deprived of the use of improvements abandoned by them, are proper elements of damages in an action by lessees against their lessor for his wrongful act, whereby they were compelled to abandon premises leased by them, and to remove to another place of business.

PRACTICE — HARMLESS ERROR. — Where a witness was asked what a leasehold was worth to him, an allowance of such question is a harmless error, if the answer of the witness shows that the only value to which he testifies is the market value.

MEASURE OF DAMAGES — LOSS OF PROFITS. — IF AN ESTABLISHED BUSINESS is wrongfully injured or destroyed, its owner can recover damages sustained thereby, and in an action for their recovery evidence of the profits he was actually making is admissible. Hence in an action against a lessor by his lessees for depriving them of the benefit of their lease, they may show the amount of business done by them before and after his alleged wrongful acts.

Stephen M. White, for the appellants.

C. F. Cronin, Baker and Long, J. O. Koepfli, and Will D. Gould, for the respondents.

FOOTE, C. This action was brought to recover damages for trespass alleged to have been committed by the defendants in "breaking and entering" upon the premises held, used, and possessed by the plaintiffs under a lease, and "forcibly and unlawfully altering and changing the construction" of the premises, "by lowering a portion of the ceiling" thereof, "and by closing up and obstructing the windows and gratings thereof through which plaintiffs obtained light and air for their said premises."

It was further alleged that these acts of the defendants rendered the premises "totally unfit and useless" for the purposes of their business, which was that of carrying on a barber-shop and bath-room; that they were thereby compelled to vacate the premises, and did vacate them under this compulsion on the third day of September, 1888, the lease not expiring until the 26th of April, 1891.

The damages claimed were from the loss of the established trade and business of the plaintiffs; from that occasioned by having to abandon a portion of the permanent improvements which they had made on the leased premises; from that resulting from the plaintiffs being compelled to abandon and lose the benefit of their leasehold interest; from that which they suffered by being deprived of the benefit of their agreement with a party who allowed them a hot-water privilege for the use of their barber-shop and bath-room, and by reason of

expenses entailed on them in their enforced removal from the premises.

The plaintiffs obtained judgment for five hundred dollars, —a very much less sum than they claimed. From that, and an order denying a new trial, this appeal is taken.

The evidence certainly tended to show that the plaintiffs occupied and used the premises as they claimed, and that the trespass was committed by the duly authorized agent of the defendant Siegel.

The main argument of the defendant seems to be on the alleged erroneous rulings of the court as to the measure of damages recoverable in the action, in the admission of evidence, and in the instructions upon the matter which it gave, refused, or modified.

In this connection the defendant urges that no damages could be recovered by the plaintiffs for the loss of the hot-water privileges, which they derived from an agreement with E. Dunham, mentioned in the eighth paragraph of the complaint.

If, as we think, the evidence tended to show that the plaintiffs were compelled to abandon their place of business by the trespass of the defendant, then they were entitled to recover whatever "amount will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not": Civ. Code, sec. 3333.

If the evidence tended to show any detriment suffered by the plaintiffs in losing this hot-water privilege, and the loss thereof was proximately caused by the trespass complained of, the plaintiffs were entitled to be compensated therefor, and it was for the jury, under all the evidence, to say if they were entitled to any compensation, and if so, how much.

The evidence did show that the plaintiffs had such a privilege, and that they paid a certain amount of money therefor, and that it was of beneficial use to them. There is also evidence which tends to show that the cause of their leaving the premises was, that the trespass complained of made their place of business unfit for the purposes for which they had leased, occupied, and possessed it. The trespass caused them to abandon the water privilege; the loss of the water privilege was one of the injuries resulting from this abandonment. This injury, then, was proximately caused by the trespass, and the plaintiffs were to be compensated therefor. We perceive no error in the eighth instruction given, nor in the evidence offered and admitted in support of the demand.

It is further urged, in behalf of the appellants' contention, that the instruction given by the court is at variance with section 3333 of the Civil Code, and misleading, in that it permits and directs the jury to take into consideration anything, however remote, which might appear to them to indicate "loss or harm." The instruction reads as follows: —

"9. The jury are instructed that if they believe from the evidence that the plaintiffs had a leasehold interest in the premises in question, and that by reason of the wrongful acts of the defendant, said leasehold interest was rendered wholly or in part worthless to the plaintiffs, or that they were compelled to abandon the same, then the plaintiffs are entitled to such an amount as will compensate them for all loss or harm suffered thereby, taking into consideration the length of time of said lease and the length of time it had been enjoyed by the plaintiffs, and the value of such advantages as they may be satisfied by the evidence were a part of or directly grew out of said leasehold interest, but not including in this item anything for loss of hot-water rights or established trade and business."

Fairly considered, this instruction announces to the jury that the damages recoverable by the plaintiffs for any loss suffered by them which rendered their leasehold interest wholly or in part worthless, occasioned by the wrongful acts of the defendant, must be measured by the whole duration of said lease under the terms thereof, and the length of time it had been enjoyed by them up to the time of the reception of the injury, and by the value of such advantages as accrued to them under the lease, which grew directly out of their interest therein, but not to include anything which resulted from the loss of hot-water rights or established trade or business, and that these damages must be in such an amount as will compensate them for any such loss.

This did not, in our own judgment, direct the jury to give damages in their nature remote or speculative, but was confined to a verdict for such detriment only as was proximately caused by the wrongful acts of the defendant as affecting loss from the injury done alone to the leasehold interest held by the plaintiffs. And although, perhaps, the instruction is not so perspicuous and clear as it might have been, we see nothing in it misleading, or conflicting with other instructions, which last most clearly kept before the jury the idea that they were to give no damages except such as were the proximate result of

the injury done; and this will appear by a glance at the other instructions given.

It is further claimed that the court erred in instructing the jury that in estimating the damages done the plaintiffs they might consider the evidence concerning the expenses of the enforced removal of the plaintiffs from the premises to another place of business, and that regarding any damage which might result from the deprival of the use of improvements abandoned by them.

The defendant contends that these elements of damage were not recoverable. The argument in this connection appears to be, that the plaintiffs could only recover for the benefits which they might have had if the defendants had permitted them to remain at their former place of business untrespassed upon.

But the plaintiffs were not, according to the tendency of their evidence, permitted to remain unmolested, but were driven away by the wrongful acts of the defendants; hence the former were entitled to recover whatever their loss might be, of which the defendant's wrongful acts were the efficient cause.

"The proximate cause is the efficient cause; the one that necessarily sets the other causes in operation": *Ætna Ins. Co.* v. *Boon*, 95 U. S. 130.

"That which is the actual cause of the loss, whether operating directly, or by putting intervening agencies, the operation of which could not be reasonably avoided, in motion, by which the loss is produced, is the cause to which such loss should be attributed": *Brady* v. *Northwestern Ins. Co.*, 11 Mich. 425.

Here the evidence on behalf of the plaintiffs tended to show that the trespass of the defendant, and his acts in accomplishing it, resulted in the plaintiffs having to leave their place of business, give up their leasehold interest, go to expense in moving their appurtenances, etc., lose the privilege which they had of hot water for baths and barber-shop, and in their having to go to another place of business less favorable or profitable, which entailed loss in their established trade and business, and having to lose the use of abandoned permanent improvements.

The cause which set all the rest in motion was the trespass. The operation of the subsequent agencies of loss was the result of this wrongful injury. Hence they proximately resulted from that trespass. To the first cause, primarily, all the dam-

ages resulting are to be attributed, although each item of damage was produced by some separate cause, following the primary cause, and operating more immediately in producing the damages: *Ætna Ins. Co.* v. *Boon*, 95 U. S. 130; citing *Louisiana Mut. Ins. Co.* v. *Tweed*, 7 Wall. 44.

Damages which accrue subsequent to the tort, but of which it is the primary cause, are not separate causes of action, but "are parts of the tort itself for which the cause of action is given": *Wood* v. *Currey*, 57 Cal. 210.

No error is perceived in the rulings of the trial court as to the instructions just mentioned, or as to the evidence admitted on the points involved therein.

Further complaint is made because the trial court allowed a question to be put to one of the plaintiffs, as follows: "What is that leasehold worth to you?"

If erroneous because it did not seek for the market value of that interest, it was harmless, in view of the answer of the witness, which plainly indicated that the value of which he testified was the market value.

The appellant contends that the court erred in allowing evidence to go to the jury as to the amount of business done by the plaintiffs before and after the alleged trespass. The complaint charged as one of the elements of damage resulting from the trespass that the plaintiffs had lost thereby their established trade and business.

With a view to show what that loss was, we think the evidence was admissible.

"The best-considered cases agree that where an established business is wrongfully injured or destroyed, the owner of the business can recover the damages sustained thereby, and that upon this question evidence of the profits which he was actually making is admissible": *Lambert* v. *Haskell*, 80 Cal. 619.

The point is made that the defendant should have been allowed to demur to the amended complaint, and to file an answer thereto.

While the trial was in progress, the plaintiffs asked leave to amend the fifth paragraph of their complaint. The request was granted. The amendment was made, and a copy of it served and filed. A recess was then taken by the court to allow the defendant to plead thereto. Upon the reassembling of the court, the defendant presented, filed, and read a demurrer, which went to other matters besides the amendment filed by the plaintiffs. Previous to this, the defendant had

demurred generally to the complaint before amendment, which was overruled for want of "presentation"; we suppose this was intended to read "prosecution."

The court refused to consider the demurrer to the amended complaint except as directed to the amendment allowed to be made, and as to that, overruled the demurrer. The defendant then asked leave to file an answer to the whole complaint as amended. This the court refused to allow, upon the ground that the only portion of the complaint which had been amended was the fifth paragraph thereof, and that the defendant might file an answer to that. Maintaining his right to answer the whole complaint, and reserving his exception, the defendant answered the fifth paragraph of the complaint.

It is true that "the amendment, together with the original amended complaint, constituted a new complaint, which superseded all other pleadings in the case": *Thompson* v. *Johnson*, 60 Cal. 295. But no reason is shown why the demurrer as filed should have been sustained on any of the grounds alleged therein, nor do we perceive that the amended complaint was obnoxious to that demurrer. The defendant was in no worse condition by the refusal of the court to consider anything but the demurrer as applicable to the amendment made to the complaint, than he would have been had the court considered and overruled the demurrer as a whole.

As to the action of the court in refusing to allow the filing of an amended answer except to that portion of the complaint which had not been already answered, it does not appear that the answer proposed to be filed differed in any essential respect from the answer on file, except with reference to that part answering the amendment of the fifth paragraph of the complaint, and that portion of the proposed answer was filed and considered. In the action of the court, therefore, as to these matters, there appears no abuse of discretion.

Perceiving no prejudicial error, we advise that the judgment and order be affirmed.

VANCLIEF, C., and BELCHER, C., concurred.

The COURT. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

Hearing in Bank denied.

LANDLORD AND TENANT — LIABILITY OF LANDLORD TO TENANT — MEASURE OF DAMAGES. — Removal by landlord from leased premises, before the expiration of the lease, of certain goods of the tenant is a subject for punitive dam-

ages: *Shores* v. *Brooks*, 81 Ga. 468; 12 Am. St. Rep. 332. Neglect of lessor to keep the leased premises in repair, whereby they are rendered useless to lessees, justifies an abandonment by them, and bars the recovery of rent, and they may recover damages for such neglect, which damages are measured by the difference in the value of the use of the premises if the repairs had been seasonably made, and such value without such repairs: *Bostwick* v. *Losey*, 67 Mich. 554.

Measure of damages for breach of contract to make a lease, where no rent has been paid, is the remainder of the market rental after deducting agreed rental. Held that for breach of contract to lease a hotel, plaintiffs could recover for their loss of time in waiting for the hotel, their expenses in coming from a distant state to the place where the hotel was, and for money paid under contract to a clerk brought with them to assist in operating the hotel: *Hall* v. *Horton*, 79 Iowa, 352.

Where a landlord by some act deprives the tenant of the beneficial use of the whole or any part of the premises leased, the tenant should be deemed evicted to the extent he is thus deprived, and the rent should be suspended during the time of such disturbance: *Pridgeon* v. *Excelsior B. Club*, 66 Mich. 326.

Where a building under lease has been torn down or removed by city authorities as dangerous, acquiescence by the lessor will not make him liable to tenant for injuries incurred: *Hitchcock* v. *Bacon*, 118 Pa. St. 272.

Alteration of the premises to such an extent as to lessen the value of the leasehold is equivalent to an eviction of the tenants, and they can recover for their loss of profits to the end of the term of their lease as the full measure of their damages: *Conlon* v. *McGraw*, 66 Mich. 194.

[IN BANK.]

GRIMSHAW *v.* BELCHER.

[88 CALIFORNIA, 217.]

IF A LICENSE IS GIVEN BY A LAND-OWNER TO BUILD A LEVEE on his lands for the purpose of protecting the land of the builder from overflow, the former, after the levee is built, has no right to revoke the license and destroy the levee.

INJUNCTION TO PREVENT THE REVOCATION OF A LICENSE TO BUILD A LEVEE on the lands of another will be granted, when, acting under such license, the licensee has constructed such levee, and it is necessary to protect his lands from overflow; and the removal or destruction of such levee will also be enjoined.

J. C. Tubbs and A. L. Hart, for the appellants.

S. C. Denson and C. H. Oatman, for the respondent.

DE HAVEN, J. The findings of the court below show that the plaintiff is the owner of a tract of land situate on the bank of the Cosumnes River, and adjoining it is another tract, owned in common by the defendants Alice J. and Lucy E. Belcher, and the estate of J. M. Belcher, of which the defend-

ant Sarah W. Belcher is the executrix; that to protect both of said tracts from overflow it is necessary to maintain a levee in front of both tracts; that just above the line dividing said lands, and on the land of defendants, there is a depression, which renders it necessary that the levee there should be of greater height and strength than at other points. The plaintiff had completed her line of levee, and the defendants were engaged in the repair of their levee, the line of which connected with that of plaintiff, and "it being feared that the floods would come and inundate the lands to be protected by said levee before the same could be finished, the plaintiff applied to the defendants for leave to enter upon their said land, and enlarge and repair that portion of the levee upon defendants' said land which extends across the said depression." The defendants consented, and gave permission to the plaintiff to repair, enlarge, and reconstruct the said section of levee at her own cost and expense. This the plaintiff did, the same being constructed mostly of earth hauled from the plaintiff's own land, and thus connected her own levee with that of the defendants, forming a continuous barrier against the waters of the river. The court further found that the defendants threatened and intended to tear down, remove, and dig away a portion of the said levee, and if they should do so it would subject the land of plaintiff to overflow and would cause great and irreparable damage to her land.

The court below gave judgment enjoining defendants from doing the threatened acts. From this judgment, and an order denying their motion for a new trial, the defendants appeal.

The permission given plaintiff to construct the section of levee referred to in the findings was verbal.

The appellants urge that the license, if ever given, is one which they have a right to revoke; that a license is always revocable when the act licensed is of such a nature that if granted by deed it would amount to an easement. To sustain this position, the case of *Potter* v. *Mercer*, 53 Cal. 667, is cited, in which case it is said: "But the effect of an executed or partly executed license, though revoked, is to excuse the licensee from liability for acts done properly in pursuance thereof and their consequences; but the revocation puts an end to the license, and no further act can be justified under it." This is undoubtedly true as a general rule, and was properly applied to the facts in that case. But the judgment

in this case does not authorize the plaintiff to do any further act upon the land of appellants. It only restrains the appellants from removing or injuring a levee built by respondent at her own cost upon the land of appellants, and with their permission, such levee so constructed being necessary in order to protect the land of respondent from overflow and irreparable damage. Such a judgment does not, as supposed by appellants, confer upon "the respondent a permanent right in the property" of appellants. It gives her no right to enter upon the land of appellants for the purpose of repairing the levee, or to rebuild it in the event of its destruction. The distinction between the right of respondent as fixed by this judgment, and a permanent right to maintain the levee in question, is clearly pointed out in the case of *Carleton* v. *Redington*, 21 N. H. 307. It is there said: "The authorities would seem to show that a license to erect a dam will give no right to repair and restore the dam when it has become ruinous and decayed. But if it be holden that a license to erect a dam implies also a license to repair the same at pleasure, it would seem, from many authorities, that the license cannot be sustained."

As to the right of the respondent to maintain this action upon the facts found by the court, there is a conflict in the decisions in the different states, many courts holding to the contrary. There are cases, however, which hold that such an action is maintainable, and we think these state the rule which is most in consonance with principles of equity.

In *Veghte* v. *Raritan Water Power Co.*, 19 N. J. Eq. 142, the court say that "in cases where the revocation would be a fraud, courts of equity give a remedy, either by restraining the revocation, or by construing the license as an agreement to give the right, and compelling specific performance by deed, as of a contract in part executed."

In the case of *Clark* v. *Glidden*, 60 Vt. 702, it is held that "a license to lay an aqueduct to a spring of water on one's land is irrevocable during the existence of the aqueduct; and a court of equity, on the ground of equitable estoppel, will protect the licensee in the use of the aqueduct, and will grant and continue an injunction restraining the owner of the spring from interfering with the aqueduct until its decay; for a revocation of the license would operate as a fraud."

And this same principle has been affirmed in the case of *Lee* v. *McLeod*, 12 Nev. 284.

Appellants further insist that the findings are not sustained by the evidence, but we cannot say from the record that the court committed any error in this respect.

Judgment and order affirmed.

MCFARLAND, J. (concurring.) I concur in the judgment, but I base my concurrence upon the particular facts of this case. A rule which applies to two coterminous owners of land, who unite in a continuous line of levee for the protection of both, would not apply to many other instances of parol license.

HARRISON, J. I concur in the judgment.

Rehearing denied.

LICENSE — INJUNCTION TO PREVENT REVOCATION OF. — A license, when executed, is generally irrevocable, but a license to erect and maintain a structure on one's land is not irrevocable, as such a construction would be in violation of the statute of frauds: *Prince* v. *Case*, 10 Conn. 375; 27 Am. Dec. 675. Where the owner of land gives license to another to build a bridge on his land, an action of trespass will lie against him for removing the bridge without the consent of the licensee: *Ricker* v. *Kelly*, 1 Greenl. 117; 10 Am. Dec. 38. A parol license to erect and maintain a dam to flow back water, if executed, cannot be revoked by the licensor or his grantees: *McKellip* v. *McIlhenny*, 4 Watts, 317; 28 Am. Dec. 711.

When labor has been expended under a license, the owner cannot assert his ownership in such a way as to interfere with the use of the license. *Wickersham* v. *Orr*, 9 Iowa, 253; 74 Am. Dec. 348.

It is against all conscience to permit a party to revoke his license after the other party has acted upon it so far that damage would result from the revocation, and estoppel *in pais* applies to such an injurious revocation: *Rhodes* v. *Otis*, 33 Ala. 578; 73 Am. Dec. 439.

Verbal license to do something on licensor's land becomes irrevocable after the expenditure of money on the land on the faith of the license: *Huff* v. *McCauley*, 53 Pa. St. 206; 91 Am. Dec. 203. See also *Flickinger* v. *Shaw*, 87 Cal. 126; *ante*, p. 234.

[IN BANK.]

PREBLE *v.* ABRAHAMS.

[88 CALIFORNIA, 245.]

AGREEMENT FOR THE SALE OF LAND, WHEN BINDS VENDEE. — An agreement signed by both vendor and vendee, declaring that the former agreed to sell to the vendee certain property for a price designated, binds the latter to pay such price.

AGREEMENT TO SELL LAND — DESCRIPTION OF PREMISES, WHEN SUFFICIENTLY CERTAIN. — An agreement for the sale of forty acres of an eighty-acre tract at Biggs is sufficiently certain to support a decree for specific performance, when aided by evidence showing that the vendors owned an eighty-acre tract at Biggs, that Mrs. B. wished to buy the

western half of such tract, and that the vendee agreed that if the vendors would sell such west half to her, he would buy the other half, and thereupon the agreement in question was executed by the parties.

AGREEMENT TO SELL REAL ESTATE NEED NOT DESCRIBE THE SUBJECT-MATTER THEREOF WITH SUCH CERTAINTY that it can be ascertained by the writing alone, or by reference to some other writing. The true rule is, that the situation of the parties and the surrounding circumstances when the contract was made can be shown by parol evidence, so that the court may be placed in the position of the parties themselves, and if then the subject-matter is identified, and the terms appear reasonably certain, it is enough.

R. H. Lindsay, and Gray and Sexton, for the appellant.

John Gale, for the respondents.

SHARPSTEIN, J. The plaintiffs, in their complaint, allege that on the thirteenth day of January, 1888, they and the defendant entered into an agreement, of which the following is a copy: —

"BIGGS, January 13, 1888.

"This agreement made and entered into by C. S. Preble and C. S. Young, of Reno, Nevada, and A. Abrahams, of the same place; said Preble and Young agree to sell to A. Abrahams, of Reno, for $125 per acre, for forty acres of the eighty-acre tract at Biggs, and upon the payment of the said sum said parties of the first part shall make, execute, and acknowledge, and deliver unto the party of the second part, a good and sufficient deed, vesting the title of said property in party of second part.

"PREBLE AND YOUNG.
"A. ABRAHAMS.

"Witness: M. BIGGS, JR."

Plaintiffs further allege that when said agreement was written it was understood between all the parties thereto that the same should contain a clause obliging said defendant to buy said land at said price of $125 per acre, and the omission of such a clause therefrom was wholly accidental and unintentional; that between the words "said Preble and Young agree to sell to Abrahams, of Reno," and the words "for $125 per acre, for forty acres of the eighty-acre tract at Biggs," in said contract, there should have been inserted the words "and said Abrahams agrees to purchase"; that the omission was the result of a mutual mistake, etc. Plaintiffs further allege that they have kept and performed all the terms, covenants, and conditions on their part to be performed, and that defendant refuses to keep or perform any of the terms, covenants, or conditions of said contract on his part, and refuses to purchase

said land, or pay plaintiffs therefor; wherefore plaintiffs pray to have said contract reformed so as to make it obligatory upon defendant to purchase said land at the price agreed upon, and that as so reformed, it be construed and enforced. In his answer, the defendant denies all the material allegations of the complaint, except the making of the memorandum in writing, a copy of which is contained in the complaint. Evidence was introduced by the plaintiffs, tending to prove the alleged mistake in the memorandum in writing of the agreement between the parties, and by the defendant, tending to prove that there was no mistake. Upon all the material issues the court found in favor of the plaintiffs, and decreed the reformation of the contract and a specific performance of it, as prayed in the complaint. Defendant moved for a new trial upon a statement. The motion was denied, and from the judgment, and from the order denying the motion for a new trial, defendant appeals.

Everything relating to the reformation of the contract may be eliminated from the case, because the contract as reformed means just what it did before it was reformed. Without any reformation, it obligated the defendant as strongly to buy and pay the price specified for the land as it did the plaintiffs to sell it for that price.

Appellant contends that the agreement which it is sought to have specifically performed is "an agreement the terms of which are not sufficiently certain to make the precise act which is to be done clearly ascertainable," and therefore cannot be specifically performed: Civ. Code, sec. 3390.

The contention is, that the agreement to sell "forty acres of the eighty-acre tract at Biggs" is not sufficiently certain to make the precise act which is to be done clearly ascertainable. This is the only agreement in writing between the parties for the sale or purchase of any real estate; and an agreeement not in writing for the sale and purchase of real estate is void. And the description of the property in the written agreement is so entirely uncertain as to render the instrument inoperative and void, unless we can go beyond the face of it to ascertain its meaning. Parol evidence is always admissible to explain the surrounding circumstances, and situation and relations of the parties, at and immediately before the execution of the contract, in order to connect the description with the only thing intended, and thereby to identify the subject-matter, and to

explain all technical terms and phrases used in a local or special sense: Pomeroy on Contracts, sec. 152.

It appears by the written agreement that the parties intended a sale and purchase of land, and that it was "forty acres of the eighty-acre tract at Biggs." If the vendors owned an eighty-acre tract at Biggs, we would assume that they intended to sell forty acres of the eighty-acre tract owned by them at Biggs. Evidence was introduced which tended to prove the location and description of the eighty-acre tract at Biggs, and in what part of the tract the forty acres which plaintiffs agreed to sell to defendant was situated. The court, in effect, found that at the date of said agreement, one Mrs. Biggs was desirous of purchasing one half of said eighty-acre tract, i. e., the western half, upon which there were valuable improvements. She offered to pay for that half five thousand dollars. Plaintiffs would not accept her offer, but offered to sell the entire eighty-acre tract for ten thousand dollars. Thereupon defendant agreed with plaintiffs that if they would sell to Mrs. Biggs the western half of said eighty-acre tract for $125 per acre, he, defendant, would purchase the other half of said eighty-acre tract and pay $125 per acre therefor. The finding is justified by the evidence, and there is no specification of the particulars in which the evidence is insufficient to justify that finding. The contracts to sell to Mrs. Biggs one half of said eighty-acre tract, and to the defendant the other half thereof, were made at the same time and place. We think the evidence makes the subject-matter sufficiently certain, and that is all that is necessary. Professor Pomeroy says: "It is not strictly accurate to say that the subject-matter must be absolutely certain from the writing itself, or by reference to some other writing. The true rule is, that the situation of the parties and the surrounding circumstances, when the contract was made, can be shown by parol evidence, so that the court may be placed in the position of the parties themselves; and if then the subject matter is identified, and the terms appear reasonably certain, it is enough": Pomeroy on Contracts, sec. 227, note. This is in consonance with the maxim, *Certum est quod certum reddi potest.* The evidence clearly shows that the parties perfectly understood that the sale and purchase was not of an undivided interest of forty acres in a tract of eighty acres, but of forty acres in severalty. The defendant does not claim in his answer, nor in his evidence, that he intended to purchase an undivided interest in the eighty-acre

tract. He denies that he intended or agreed to purchase any interest whatever. Nothing is made more clear by the evidence than that Mrs. Biggs, with the full knowledge of all the parties, purchased the forty acres of said eighty-acre tract upon which the improvements were located. This is clearly specified in the written agreement between her and the plaintiffs. They agreed to sell her forty acres, including the buildings and orchards on the forty acres, to be taken by her where the houses and barns and orchards were at that time, and the same place on which Mr. Biggs, Jr., and his family were residing. This and the agreement to sell to the defendant were contemporaneous. The defendant, if he agreed to purchase anything, agreed to purchase the forty acres remaining after the forty acres purchased by Mrs. Biggs had been segregated from said eighty-acre tract.

By the judgment of the court below, the plaintiffs are required "to execute, duly acknowledge, and deliver to said defendant a good and sufficient deed of conveyance in fee, and free and clear of all encumbrances, the form of the same to be settled and approved by the judge of said superior court, if the parties differ respecting it, of the following described premises, to wit: Forty acres of land, being the eastern half of said eighty-acre tract described in said complaint, and the part thereof not heretofore conveyed to M. Biggs, Jr., said eighty-acre tract being one of the tracts into which the ranch known as Biggs's upper ranch is divided, and upon the western half of which the dwelling-house and buildings used in connection with said ranch are situated, all being situated near Biggs, in said Butte County." And it is further adjudged that if said defendant refuse to receive said deed, the plaintiffs file the same with the clerk of the court; and that upon such delivery or filing of said conveyance, the defendant pay to the plaintiffs, or their attorney, the sum of five thousand dollars, the purchase price named in said agreement.

It is urged on behalf of the defendant that said premises are encumbered, and therefore he ought not to be compelled to accept a conveyance of them. He is not compelled to accept a conveyance which does not vest in him the fee free of all encumbrances. He was once tendered a conveyance, which he did not refuse to accept on the ground that it did not convey the premises free of all encumbrances, but on the ground that he had never agreed to purchase the premises.

He is amply protected by the judgment against any encumbrances, and until he is tendered a conveyance free of all encumbrances, he is not compelled to accept it or to pay anything to the plaintiffs.

The errors of law specified are such as could not have affected the substantial rights of the parties, and therefore must be disregarded.

Judgment and order affirmed.

VENDOR AND VENDEE — SUFFICIENCY OF DESCRIPTION IN CONTRACT FOR SALE OF REAL ESTATE. — A description of land in a contract to convey, as "lot 6, lying within the city limits of St. Paul, amounting to six and seventy hundredths acres, according to government survey, upon the Mississippi River," is sufficiently definite: *St. Paul Land Co.* v. *Dayton*, 42 Minn. 73. "Whatever lots or lands which may be owned by the parties of the first part in the of Montville" is sufficient: *St. Paul Land Co.* v. *Dayton*, 42 Minn. 73. "A house on Church Street" is a sufficient description to satisfy the statute of frauds, and the house may be identified by parol evidence: *Mead* v. *Parker*, 115 Mass. 413. "A house and lot on Amity St., Lynn, Mass.," is a sufficient description, and parol evidence is admissible to apply the description to a house and lot on such street owned by the vendor at the time the memorandum was signed: *Hurley* v. *Brown*, 98 Mass. 545.

PEERS *v.* MCLAUGHLIN.

[88 CALIFORNIA, 294.]

A MORTGAGE DEFECTIVELY EXECUTED, or an imperfect attempt to create a mortgage upon specific property, for the purpose of securing a debt, will create a specific lien upon the property intended to be mortgaged.

EQUITABLE MORTGAGE. — MORTGAGE EXECUTED BY A FATHER ON BEHALF OF HIMSELF AND HIS CHILDREN, when he did not have authority to execute it for them, is nevertheless enforceable as an equitable mortgage, if it was given as part of the purchase price of property which the mortgagee had sold and conveyed to the father and children pursuant to an agreement that they would give him a mortgage for the unpaid purchase-money.

A MINOR WILL NOT BE PERMITTED TO ADOPT A PART OF AN ENTIRE TRANSACTION which is beneficial to him, and reject its burdens. Hence if a father of minors acts for them, they must either accept or repudiate the entire transaction; they cannot retain its fruits and at the same time deny its obligations.

MINORS CANNOT AVOID A MORTGAGE AND AFFIRM A DEED, WHEN BOTH ARE MADE AT THE SAME TIME, relate to the same property, and together make but one transaction.

Chase and Chase, and C. Y. Brown, for the appellants.

J. M. Seawell, and Reinstein and Eisner, for the respondents.

DE HAVEN, J. The court below adjudged that defendant Thomas McLaughlin is indebted to the plaintiffs in the sum of $1,615.24, and that said indebtedness is a lien upon the land described in the complaint, and directed that it be sold to satisfy said lien. All of the defendants appeal from this judgment. There is no bill of exceptions in the record. The findings show the following facts: The defendants John Thomas Edward McLaughlin and Margaret McLaughlin are minor children of the defendant Thomas McLaughlin. In March, 1884, the plaintiffs and the defendant Thomas McLaughlin made an agreement, the plaintiffs to convey to said Thomas McLaughlin and his said minor children the land described in the complaint for the sum of two thousand five hundred dollars, and at the same time the defendant Thomas McLaughlin paid to plaintiffs on account of said purchase the sum of thirteen hundred dollars, and the balance of twelve hundred dollars was to be paid October 1, 1884. On October 10th following, this balance was still unpaid, and it was then agreed between plaintiffs and the defendant Thomas McLaughlin, "for himself and his said children, ... that plaintiffs should execute a deed of said land to Thomas McLaughlin and his said children, and that the said balance of said purchase price should be secured by a mortgage upon said lot of land."

Thereupon plaintiffs conveyed said land to the defendant McLaughlin and his said minor children, at the same time receiving back a note for twelve hundred dollars, and a mortgage to secure it upon the land conveyed. The mortgage recited that "Thomas McLaughlin, John Thomas Edward McLaughlin, and Margaret McLaughlin" are parties thereto of the first part, and was signed, —

"THOMAS MCLAUGHLIN. [Seal]
"THOMAS MCLAUGHLIN, [Seal]
"Guardian of the persons and estates of John Thomas Edward McLaughlin and Margaret McLaughlin, minors."

The note was also signed by Thomas McLaughlin for himself, and also, below, as guardian for the said minors.

The court further finds "that said deed and mortgage were drawn by one Oliver Walcott, an attorney at law, who represented to said plaintiffs that said mortgage was sufficient to create a lien for said sum of twelve hundred dollars, upon the interests of said children as well as upon the interest of said Thomas McLaughlin in said lot of land, and that said plain-

tiffs, when they executed said deed and received the mortgage, believed that said mortgage was sufficient and effective" for that purpose.

It is claimed by the defendant minors that the judgment is erroneous, in so far as it makes the said indebtedness of the defendant Thomas McLaughlin a lien upon their interest in the land so conveyed to them.

There is nothing in the case showing that any portion of the money paid by the defendant Thomas McLaughlin belonged to said minors, or whether he was or was not in fact the guardian of their estates.

We are of the opinion that upon the facts appearing here the mortgage referred to may be enforced as an equitable mortgage upon the whole land, and whatever interest the defendant minors may have acquired therein by virtue of the deed referred to is subject to its lien.

The principle is well settled in equity that a mortgage defectively executed, or an imperfect attempt to create a mortgage upon specific property for the purpose of securing a debt, will create a specific lien upon the property so intended to be mortgaged: *Daggett* v. *Rankin*, 31 Cal. 327; *Love* v. *Sierra N. L. W. & M. Co.*, 32 Cal. 652; 91 Am. Dec. 602.

In *Remington* v. *Higgins*, 54 Cal. 620, which was an action against husband and wife, the facts were, that the husband bargained for land, agreeing that a mortgage should be given to secure the purchase price, and at his request the deed was made to his wife, and she executed the mortgage. This mortgage was, however, invalid, because by the conveyance to the wife the property became community property, and as such was not subject to mortgage by the wife. In dealing with that state of facts, the court uses this language: "Admitting that the transaction did not create a mortgage in law, and not deciding but that plaintiff may have waived his lien of a vendor, we are of the opinion that plaintiff has a lien upon the premises by way of equitable mortgage to recover the unpaid portion of the purchase-money and interest. The husband in bargaining for the premises agreed that a mortgage should be given; a paper was executed, in pursuance of that agreement, which was supposed by the parties to have accomplished that object. It now appears that that paper is invalid as a mortgage. Equity will treat that as done which the parties agreed to have done, and which ought to have been done."

So in this case, the father agreed that the balance of the purchase price should be secured by a mortgage of the land conveyed, and we presume that the one under consideration was executed by him in good faith to carry out that agreement, and the court below finds that the plaintiffs accepted it under the belief that it was a valid lien upon the whole land they were conveying, and it was because the plaintiffs so relied upon it that the defendants were enabled to acquire any interest in the land. We have not overlooked the fact that in all the cases above cited the persons against whom the imperfect instrument was enforced had the capacity to make a valid contract, while by the judgment here it is the land of minors who were and are incapable of contracting for land, and, in a general sense, of ratifying such a contract, against which this mortgage is enforced.

But this fact ought not, under the circumstances here disclosed, to prevent the application of the equitable rule which lies at the foundation of these cases. It must be borne in mind, also, that the agreement of the father and his assumed agency in accepting a deed in pursuance of the agreement is the source or foundation of all the right, legal or equitable, which these minors have in the land. The deed was made to them solely by direction of the father. That was the form which the transaction took, and in equity the agreement that the purchase price should be secured by a mortgage upon the land, the conveyance and the mortgage must be regarded as one transaction, and no person, whether minor or adult, can be permitted to adopt that part of an entire transaction which is beneficial, and reject its burdens.

This commanding principle of justice is so well established, that it has become one of the maxims of the law. The father acted for the children, and they must either accept or repudiate the entire contract which he made; they cannot retain its fruits and at the same time deny its obligations.

"A party cannot apply to his own use that part of the transaction which may bring to him a benefit, and repudiate the other, which may not be to his interest to fulfill. Thus it has been held that an infant cannot avoid a mortgage and affirm a deed, when both are made at one and the same time, relate to the same property, and go to make up one transaction. If the mortgage be avoided under the plea of infancy, the deed becomes of no effect": *Heath* v. *West*, 28 N. H. 108.

In this case the minors are before the court, and have filed

an answer by their guardian *ad litem*. They have not disclaimed the title vested in them by the deed procured under the circumstances stated, but seek to defeat the lien of plaintiffs' mortgage, so far as their title is concerned, by the plea "that they have not ratified any contract relating to the sale of said lot, and that they are incapable of ratifying the same." But what the rules of equity would not permit them to do if they had attained their majority they cannot be permitted to do now through their guardian *ad litem*.

Judgment affirmed.

EQUITABLE MORTGAGE, WHAT CONSTITUTES: See extended note to *Hutzler* v. *Philips*, 4 Am. St. Rep. 696–708. A mortgage on real estate, executed in favor of a partnership in its firm name, and recorded as required by statute, constitutes a valid lien upon the property in favor of the firm as security for indebtedness to it: *Bank* v. *Johnson*, 47 Ohio St. 306. When the rights of innocent third parties will not be affected, a mortgage discharged from record will be given its original priority as a lien by a court of equity: *Ferguson* v. *Glassford*, 68 Mich. 36.

MINOR CANNOT DISAFFIRM HIS CONTRACT, and also retain the benefits thereof: See extended note to *Craig* v. *Van Bebber*, 18 Am. St. Rep. 660. He cannot affirm a portion of a single transaction, and disaffirm the rest. He must abide by it or disaffirm it *in toto*: See same note, page 659.

[IN BANK.]

MASON *v.* VESTAL.

[88 CALIFORNIA, 396.]

SALE MADE TO HINDER, DELAY, OR DEFRAUD CREDITORS IS, as to them, absolutely void, and not voidable merely.

PLEADING FRAUD WHEN NECESSARY. — When a sheriff is sued for possession or conversion of property, and denies the title of the plaintiff, he may, under such denial, prove that a transfer to plaintiff was made to hinder, delay, or defraud creditors of the vendor, and that the sheriff represents one of such creditors.

PLEADING. — SHERIFF, IN AN ACTION AGAINST HIM FOR THE POSSESSION OR CONVERSION OF PROPERTY, need not anticipate the source of the plaintiff's title, nor allege that it was acquired for the purpose of hindering, delaying, or defrauding creditors. Such defense is admissible under the denial to plaintiff's title.

WITNESS — PRIOR. — Evidence that a witness, long prior to the trial, made statements consistent with his testimony is not admissible when he has been impeached by evidence of his bad reputation, to rebut the effect of such impeaching evidence.

John F. Ellison and J. T. Matlock, for the appellant.

A. M. McCoy, Clay W. Taylor, and Jackson Hatch, for the respondent.

TEMPLE, C. This appeal is from the judgment and from an order denying defendant's motion for a new trial. The suit was brought against the sheriff to recover for property seized at the suit of L. Newcomer against James Gleason, who is a brother of the plaintiff. The answer denies the title and possession of plaintiff, justifies under the writ, and avers title in Gleason.

Plaintiff derives her title from Gleason, and at the trial the controversy was as to the validity of the transfer to her. The questions raised relate almost entirely to alleged erroneous rulings in the admission of evidence tending to establish the *bona fides* of the sale to plaintiff.

On the trial the plaintiff objected to the testimony of defendant on this subject, claiming that the answer did not raise the issue of fraud, and now insists that if the rulings complained of are erroneous they are still not injurious, for the same reason.

It is claimed that the insufficiency of this answer is established by the cases of *Albertoli* v. *Branham*, 80 Cal. 633, 13 Am. St. Rep. 200, and *Sukeforth* v. *Lord*, 87 Cal. 399.

In those cases, however, the defendants did not content themselves with merely denying the right of plaintiff, justifying under a writ, and averring title in the debtor of the attaching creditor, but proceeded to charge the plaintiff with an attempt to assist the debtor in defrauding his creditors. It is not necessary to set up such a defense. It has been held that the defendant is not required to anticipate the source from which plaintiff claims to derive his title, but if he does proceed to set up the acts of fraud which he charges render plaintiff's title invalid, he must state facts which are sufficient in law to that end.

But such plea is entirely unnecessary. A sale made to hinder, delay, and defraud creditors is, as to such creditors, absolutely void, and not voidable merely: Civ. Code, sec. 3439; Freeman on Executions, 136; *Butler* v. *Collins*, 12 Cal. 463.

When the defendant denies the plaintiff's title, and shows himself to be a creditor, such evidence is admissible in rebuttal of plaintiff's proof of title. It shows such title invalid; that, as to defendant, the transfer is void.

This question was expressly decided by this court in *Grum* v. *Barney*, 55 Cal. 254, and in *Humphreys* v. *Harkey*, 55 Cal. 284; and decisions elsewhere accord with these decisions: See *Tupper* v. *Thompson*, 26 Minn. 385.

James Gleason was a witness for the plaintiff, and gave evidence in support of nearly all the facts constituting plaintiff's case. In rebuttal, he was impeached by evidence of statements made by him inconsistent with his testimony, and by showing that his reputation for truth was bad. The plaintiff was then allowed, against the objection of defendant, to prove by other witnesses that he had also made statements consistent with his testimony. When this testimony was objected to, counsel explained the offer: "We propose to prove [statements made?] at a time so far remote that there was no possibility he would foresee it, and which preclude the idea that the story was a fabrication of recent date."

Respondent does not claim the right to prove such statements in rebuttal of the statements proved by defendant, but he claims that the fact that his witness was impeached by evidence of bad reputation justifies such evidence.

The first thing that strikes one upon such a proposition is, that this character of evidence does not meet the emergencies of the case. Where a witness is discredited by showing that he is not disinterested, but is testifying under an inducement to misstate the facts, there is some plausibility in the claim that statements to the same effect as his testimony, made before he became interested, tend in some degree to show that his testimony was not affected by this interest. Here the question was, whether Gleason was a truthful man, and the evidence had no bearing upon that issue.

The doctrine upon this subject is discussed in *People* v. *Doyell*, 48 Cal. 90; *Barkly* v. *Copeland*, 74 Cal. 1; 5 Am. St. Rep. 413; and 1 Greenl. Ev., sec. 469.

These authorities do not support the respondent in this matter, and he has not referred us to any which do. On the hypothesis of the plaintiff, Gleason had no interest in the case—nor could he have had any, except upon the theory of the defense that the transaction was an attempt to hide his property from his creditors; and upon that supposition, who can tell how long he had been seeking a cover for his fraud?

It is not denied that the evidence was material, and it must have been injurious. The trial was before a jury, who found for plaintiff. We think the ruling erroneous.

The other alleged errors need not be noticed, as they may not be repeated on a new trial, except the point made that the evidence does not show an immediate delivery. Upon that

point we think there was evidence enough to warrant the court in submitting the matter to the jury.

We advise that the judgment and order be reversed, and a new trial ordered.

VANCLIEF, C., and FOOTE, C., concurred.

The COURT. For the reasons given in the foregoing opinion, the judgment and order are reversed, and a new trial ordered.

FRAUDULENT CONVEYANCE, WHETHER VOID OR VOIDABLE: See *Steele* v. *Coon*, 27 Neb. 586; 20 Am. St. Rep. 705, and note; *Helms* v. *Green*, 105 N. C. 251; 18 Am. St. Rep. 893, and note. Assignment by an insolvent debtor of a life insurance policy payable to himself to avoid the payment of his debts is void as to creditors: *Savings Bank* v. *McLean*, 84 Mich. 625. Making of a general assignment by a debtor for the benefit of his creditors in such a way as to give preference to one over another is, in some of the states, fraudulent and void: *Hanford Oil Co.* v. *Bank*, 126 Ill. 584; *Lancaster* v. *Wheeler*, 62 N. H. 479; *Bank of Commerce* v. *Payne*, 86 Ky. 446. A conveyance for the purpose of hindering and delaying creditors is fraudulent and void: *Weber* v. *Mick*, 131 Ill. 520. All transfers made in trust for the use of a grantor are fraudulent and void as against his creditors: *Kendall* v. *Bishop*, 76 Mich. 634. A party who conveys away his land to prevent the state from subjecting it to the payment of fines is guilty of fraud, and such conveyance is void: *State* v. *Burkeholder*, 30 W. Va. 593. A fraudulent conveyance is valid, except as to creditors: *Fordyce* v. *Hicks*, 76 Iowa, 41.

PLEADING FRAUD, WHEN NECESSARY: *People* v. *Healy*, 128 Ill. 9; 15 Am. St. Rep. 90, and note. How fraud must be pleaded: *Helms* v. *Green*, 105 N. C. 251; 18 Am. St. Rep. 893, and note. A court of equity can only decree on the case made by the pleadings; fraud not put in issue by the pleadings cannot be introduced by depositions: *Welfley* v. *Shenandoah etc. Co.*, 83 Va. 768. An allegation that defendant has disposed of the greater part of his property with intent to defraud creditors, and has left the state with like intent, will sustain a warrant of attachment: *Roddey* v. *Erwin*, 31 S. C. 36. A complaint is bad which fails to aver that the debtor, after a fraudulent conveyance, had not money enough left to pay his debts: *Sell* v. *Bailey*, 119 Ind. 51. Charges of fraud or mistake must be specific, to avail anything: *Howard* v. *Pensacola etc. R. R. Co.*, 24 Fla. 560.

[IN BANK.]

SPECT *v.* SPECT.

[88 CALIFORNIA, 437.]

PRACTICE — FINDINGS. — IF A COURT DECLINES TO FIND upon certain issues, on the ground that they are not material, the appellate court will presume that evidence was offered thereupon, and will reverse the judgment if, in its opinion, the issues were material.

MORTGAGEE MAY BE GIVEN THE RIGHT TO THE POSSESSION of the mortgaged property as additional security for his debt, and this may be done by parol agreement, and the right to retain possession is not dependent on the right to foreclose the mortgage, but solely on the existence of the debt.

LAND IS HELD IN PLEDGE WHEN A MORTGAGOR GIVES A MORTGAGEE POSSESSION as additional security for his debt, and the pledgee has the right to retain possession until the debt is paid, though the statute of limitations has barred all remedy for its recovery.

MORTGAGEE IN POSSESSION IS ENTITLED TO RETAIN SUCH POSSESSION UNTIL HIS DEBT IS PAID, and cannot be deprived thereof by an action of ejectment, although the statute of limitations has barred his right to maintain an action to enforce the debt.

MORTGAGOR CANNOT MAINTAIN EJECTMENT AGAINST HIS MORTGAGEE UNTIL the debt is paid, and it cannot be paid by mere lapse of time.

B. F. Howard and S. G. Tompkins, for the appellant.

H. M. Albery and W. G. Dyas, for the respondent.

HARRISON, J. The defendant, in her answer to a complaint in ejectment, which was in the ordinary form, denied all its allegations, and "for a separate and equitable defense to plaintiff's action, and for the purpose of obtaining equitable relief herein," alleged that in October, 1875, Jonas Spect, who was then the owner and in possession of the demanded premises, conveyed the same to one Montgomery; that in October, 1876, said Jonas Spect borrowed from the defendant the sum of $2,200, and executed to her his promissory note therefor; that on the second day of January, 1877, he procured said Montgomery to convey the demanded premises to her, and that at the same time, and as a part of the same transaction, an agreement was entered into between herself and said Jonas Spect, declaring that said conveyance was made as security for the payment of said promissory note; "that by virtue of said conveyance from Montgomery, and said agreement, and by the consent of said Jonas Spect, defendant took possession of the demanded premises, and has ever since remained, and is now, in actual possession of the same, claiming them as her own; that no part of said $2,200 has ever been paid, principal

or interest, but the whole thereof is now due and unpaid, amounting to $5,632"; and prayed judgment that plaintiff's complaint be dismissed. The action was tried by the court, and judgment rendered for the plaintiff. The court made findings of the facts alleged in the complaint, and incorporated therein the following statement, with reference to the equitable defense set up in the answer: "The court declines to find on the fact whether or not defendant has a mortgage lien on the premises in controversy, for the reason that the court is of the opinion that it is not necessary for the disposition of the issues involved in this case to find upon that matter, this being an action of ejectment, and the only question involved being the right to the possession of the premises described in plaintiff's complaint." The defendant has appealed directly from the judgment, and presents as a ground for its reversal that the court failed to find upon the issues presented by her equitable defense.

Inasmuch as the court gives as its reason for not making findings upon these issues that such findings were immaterial, we must assume that evidence was introduced at the trial sufficient to support the allegations, and therefore the rule announced in *Himmelman* v. *Henry*, 84 Cal. 104, has no application. If the facts alleged by the defendant constitute a defense to the cause of action set forth in the complaint, they presented material issues upon which the court should have made findings, and a failure to do so was error which will require a reversal of the judgment.

The court does not find by what means the plaintiff became the owner of the demanded premises, but as it is alleged in the equitable defense above named that Jonas Spect was the owner at the time he made the conveyance to Montgomery, we must assume that the plaintiff's title is derived under him, and is therefore subject to whatever encumbrance was created by the foregoing acts in favor of the defendant, and that the plaintiff can assert no greater rights to the premises than could Jonas Spect himself, were he the plaintiff herein. It may also be assumed, although it does not appear in the record that such point was presented to the court below, that the defendant's right of action upon the debt for which this mortgage was given to her was barred by the statute of limitations.

The question to be determined is, Can a mortgagor, who has placed his mortgagee in possession of the mortgaged premises,

maintain ejectment against him while the debt for which the mortgage was given remains unsatisfied, even though an action by the mortgagee for the recovery of the debt is barred by the statute of limitations?

Section 2927 of the Civil Code declares that "a mortgage does not entitle the mortgagee to the possession of the property, unless authorized by the express terms of the mortgage; but after the execution of the mortgage the mortgagor may agree to such change of possession without a new consideration."

The right of the mortgagee to take possession of the mortgaged premises does not depend upon the statute. The mortgagor could at all times, even by a parol agreement, give to his mortgagee this additional security: *Fogarty* v. *Sawyer*, 17 Cal. 589; *Edwards* v. *Wray*, 11 Biss. 251. In taking such possession, the mortgagee does not thereby acquire any estate in the land, or obtain for his mortgage any higher character or any different or greater protection, than it would otherwise have possessed. In any action to enforce the mortgage, or to collect the debt for which it was given as security, the mortgagee has no additional rights by reason of the fact that he is in possession of the mortgaged premises with the consent of the mortgagor. Such possession does, however, give him rights in addition to those conferred by the mortgage. It is an additional security for the debt, which he is entitled to retain in accordance with the terms under which it was received. This right to retain the possession of the land is not coincident with a right to foreclose his mortgage, or dependent upon such right, but depends solely upon the existence of the debt. The possession of the land is a special security for the debt, distinct and separate from the mortgage, which has been conferred by an act of the debtor, and the right to retain the same is independent of and distinct from any right springing from the mortgage. A mortgage is defined by section 2920 of the Civil Code to be "a contract by which specific property is hypothecated for the performance of an act, without the necessity of a change of possession." The use of the term "hypothecate" signifies that possession is not an incident of the mortgage, and that the fact of possession is entirely distinct from the contract of hypothecation. When, therefore, in addition to the contract of hypothecation, the debtor gives to his creditor the possession of the mortgaged premises, he thereby, in addition to the mortgage which he has executed, also pledges the

land to him as security for the debt, and confers upon him such rights as are incident to a pledge.

The common law recognized this species of landed security. It was there called *vadium vivum*, as distinguished from the *vadium mortuum*. This is defined by Chancellor Kent to be: "when the creditor takes the estate to hold and enjoy it without any limited time of redemption, and until he repays himself out of the rents and profits. In that case the land survives the debt, and when the debt is discharged, the land, by right of reverter, returns to the original owner": 4 Kent's Com. 137; 2 Bla. Com. 157; Co. Lit. 205 a. The holding of the land in pledge is like the holding of any other pledge. Until the debt is repaid the owner of the pledge cannot recover it from the creditor. The holder of personal property given as security for a debt is entitled to retain the same from the owner until the debt is satisfied, even though the statute of limitations has barred all right of action to recover the debt: *Jones* v. *Merchants' Bank*, 4 Rob. (N. Y.) 221. Under the same principle the mortgagee in possession is entitled to retain such possession until the debt is paid. "The mortgagee's right, being in possession, to defend himself against an ejectment by the mortgagor, is but a right to retain the possession of the pledge for the purpose of paying the debt. Such a right is but the incident of the debt, and has no relation to a title or estate in the lands": *Kortright* v. *Cady*, 21 N. Y. 364; 78 Am. Dec. 145. "On the same principle that the party who holds goods in pledge for a debt may retain those goods, even after an action at law upon such debt has been barred, the party who has got rightful possession of land mortgaged may retain possession thereof until his debt is paid, although he can bring no action to enforce the debt": *Henry* v. *Confidence M. Co.*, 1 Nev. 622. In *Dutton* v. *Warschauer*, 21 Cal. 625, 82 Am. Dec. 765, it is said: "When possession is taken by the mortgagee after condition broken, by consent of the mortgagor, it will be presumed, in the absence of clear proof to the contrary, to be with the understanding that the mortgagee is to receive the rents and profits, and apply them to the payment of the debt secured. There is, indeed, no other good reason why the mortgagee should be let into possession in preference to any other party, and unless a limitation to the period of possession is fixed at the time, it will be considered as extending until the satisfaction of the debt. Having thus entered, the mort-

gagee can hold against the mortgagor, and all others, until such satisfaction is obtained."

The rights which grow out of the relations existing between mortgagor and mortgagee, as well as the remedies for the enforcement and protection of those rights, are of equitable origin, and are to be determined by the principles of equity, whether the right be asserted or the remedy sought in an action at law or in equity. These principles, when once established, become the guidance of courts of law as well as of equity, even in those countries where the tribunals of law and equity are distinct. It was said by Lord Redesdale: "The distinction between strict law and equity is never in any country a permanent distinction. Law and equity are in continual progression, and the former is constantly gaining ground upon the latter. A great part of what is now strict law was formerly considered as equity, and the equitable decisions of this age will unavoidably be ranked under the strict law of the next." Section 307 of the Code of Civil Procedure declares: "There is in this state but one form of civil actions for the enforcement or protection of private rights and the redress or prevention of private wrongs." While all distinctions in the form of actions are abolished, yet the principles upon which the rights of parties are to be determined remain to guide the judgment of the court. Courts look to the substantial rights of the parties for the purpose of determining the remedy to which they are entitled, irrespective of the form of the complaint under which the remedy is sought. Whenever a mortgagor seeks a remedy against his mortgagee, which appears to the court to be inequitable, whether it be to cancel the mortgage as a cloud upon his title (*Booth* v. *Hoskins*, 75 Cal. 271), or to enjoin a sale under the power given by him in the security (*Grant* v. *Burr*, 54 Cal. 298), or to recover from the mortgagee the possession of the mortgaged premises, the court will deny him the relief he seeks, except upon the condition that he shall do that which is consonant with equity.

In accordance with these principles, it is a settled rule that a mortgagor cannot maintain ejectment against his mortgagee until the debt is paid: *Phyfe* v. *Riley*, 15 Wend. 248; 30 Am. Dec. 55; *Hubbell* v. *Moulson*, 53 N. Y. 225; 13 Am. Rep. 519; *Fee* v. *Swingly*, 6 Mont. 596; *Roberts* v. *Sutherlin*, 4 Or. 220; *Cooke* v. *Cooper*, 18 Or. 142; 17 Am. St. Rep. 709; *Frink* v. *Le Roy*, 49 Cal. 314; *Tallman* v. *Ely*, 6 Wis. 244; *Brinkman*

v. *Jones*, 44 Wis. 512; *Sahler* v. *Signer*, 44 Barb. 614; *Madison Avenue Church* v. *Oliver St. Church*, 73 N. Y. 82; *Den* v. *Wright*, 7 N. J. L. 175; 11 Am. Dec. 546; *Wells* v. *Van Dyke*, 109 Pa. St. 335; *Duke* v. *Reed*, 64 Tex. 705; Jones on Mortgages, sec. 715.

The debt is not satisfied or paid by mere lapse of time. The statute of limitations is a bar to the remedy only, and does not extinguish, or even impair, the obligation of the debtor. It is available in judicial proceedings only as a defense, and can never be asserted as a cause of action in his behalf, or for conferring upon him a right of action. It is to be used as a shield, and not as sword. "It has never been held that the expiration of the statutory time for bringing an action to recover a debt, or to enforce any personal obligation, operated either as an extinguishment or payment. Such a result cannot be derived from the language of our statute, the reason or policy of the law, or the decisions of courts in this state or elsewhere": *Grant* v. *Burr*, 54 Cal. 301.

The mortgagee, after the mortgage debt has been barred by the statute of limitations, cannot by any affirmative proceedings on his part invoke the aid of the court for the collection of the debt; but if the mortgagor has placed him in the possession of the land mortgaged, he does not lose the right thus conferred upon him, and can resist any action by the mortgagor to deprive him of this security. In *Frink* v. *Le Roy*, 49 Cal. 314, a decree of foreclosure and sale of the mortgaged premises was entered in 1859. Thereupon Le Roy, one of the mortgagees, took possession of the premises under an agreement between the parties that he might do so, and apply the rents to the satisfaction of the judgment. In 1870, Frink, who had succeeded to the interest of the mortgagor in the premises, brought an action in ejectment against Le Roy for their recovery. Le Roy, in his answer, by way of equitable defense, set up the mortgage, the judgment foreclosing the same, and the agreement under which he had taken possession. To this defense the plaintiff pleaded the statute of limitations. Upon an appeal from a judgment in favor of the plaintiff, the supreme court held that the statute of limitations had no application, and that Le Roy's right to remain in possession under the agreement was not affected by it, saying that "the equity of Le Roy to be maintained in possession until satisfaction of the debt is not lost from the fact that for upwards of ten years he has been in the actual possession of that of

which he is now sought to be deprived." In *Hubbell* v. *Moulson*, 53 N. Y. 225, 13 Am. Rep. 519, it was held that the mortgagor could not maintain an action in ejectment against the mortgagee for the mortgaged premises, even though he could prove at the trial that the mortgagee had received from the lands sufficient rents and profits to satisfy the debt; that such receipt did not *ipso facto* satisfy the mortgage and discharge its lien, but was in the nature of an equitable set-off to the amount due upon the mortgage debt, and that until after a judicial determination had been had upon an accounting in equity, and the application of these receipts decreed by the court in satisfaction of the debt, the mortgage was not satisfied.

Section 346 of the Code of Civil Procedure provides that "an action to redeem a mortgage of real property, with or without an account of rents and profits, may be brought by the mortgagor, or those claiming under him, against the mortgagee in possession, or those claiming under him, unless he or they have continuously maintained an adverse possession of the mortgaged premises for five years after breach of some condition of the mortgage." If the mortgagor could maintain ejectment against his mortgagee after the debt for which the mortgage was given had become barred by the statute of limitations, he would have no need to bring an action to redeem the mortgage; and if the mortgagee had maintained an adverse possession of the mortgaged premises for five years after the breach of some condition of the mortgage, such adverse possession would be a complete defense to the action of ejectment. Mere lapse of time does not constitute adverse possession, but if the mortgagor could maintain ejectment as soon as the right of action upon the debt were barred by the statute of limitations, the provisions of this section would be meaningless.

It follows, from a consideration of the principles which we have herein stated, that the equitable defense alleged by the defendant was, if sustained by proofs, sufficient to defeat the plaintiff's right of recovery, and that the failure of the court to make findings upon the issues so presented was error, for which the judgment must be reversed, and it is so ordered.

Rehearing denied.

MORTGAGE — MORTGAGEE IN POSSESSION. — Where the mortgagee by the terms of the instrument is placed in possession of the land mortgaged, the mortgagor cannot recover possession without payment of the debt secured thereby: *Rodrigues* v. *Haynes*, 76 Tex. 226. The mortgagor may require a

retransfer of mortgaged premises only upon payment of debt: *Cooper* v. *Smith*, 75 Mich. 247. Where the mortgagee holds possession under an arrangement with the mortgagor, such possession does not become adverse until the debt is satisfied, or he asserts an absolute title in himself, and gives distinct notice to the mortgagor: *McPherson* v. *Hayward*, 81 Me. 329. See also *Jackson* v. *Lynch*, 129 Ill. 72; *Stillwell* v. *Hamm*, 97 Mo. 579.

HARBOR COMMISSIONERS *v.* REDWOOD COMPANY.

[88 CALIFORNIA, 491.]

PENALTIES ARE NOT DAMAGES, BUT ARE PUNISHMENTS imposed for breach of duty enjoined by law.

LEGISLATURE CANNOT DELEGATE TO AN EXECUTIVE BODY THE POWER TO IMPOSE A PENALTY for the violation of a rule or regulation, though the legislature fixes the maximum of such penalty.

J. H. G. Weaver and J. N. Gillett, for the appellant.

S. M. Buck, for the respondent.

GAROUTTE, J. This is an action to recover a penalty of five hundred dollars imposed by the plaintiff upon the defendant, for the violation of certain rules and regulations made by plaintiff.

Section 2568 of the Political Code provides that "the board of harbor commissioners of the port of Eureka are authorized and empowered to make such rules and regulations, and take such action, as may be necessary for the protection of navigation in Humboldt Bay."

Section 2569, subdivision 6, provides: "Impose penalties for violation of such rules and regulations, not exceeding, for any one violation, the sum of five hundred dollars, to be recovered by action."

Section 5 of the rules and regulations made by plaintiff, in pursuance of the above sections of the code, imposes a penalty in the sum of five hundred dollars for the violation of certain of these rules.

We do not believe the plaintiff has the power to impose a penalty as provided in the rule just mentioned.

The imposition of a penalty is in the nature of a *quasi* criminal proceeding, as it only follows from the violation of some law.

In *United States* v. *Montell*, Taney, 52, referring to the character and object of penalties, we find this language:—

"It is not damages, therefore, that are intended to be se-

cured, but punishment intended to be inflicted upon those who are justly and properly responsible for any improper use of the vessels' register. In other words, it is a fixed penalty imposed by law as a punishment for breach of duty enjoined by law, and must be treated as such," etc.

The board of harbor commissioners is a creature of the statute, and purely an executive body, and the fixing and imposing of penalties are matters of which the legislature alone has cognizance. An act providing that if a person does or does not do a certain thing he shall pay a penalty of five hundred dollars is legislation. And it is a cardinal principle of representative government that the legislature cannot delegate the power to make laws to any other authority or body. Cooley's Constitutional Limitations, 116, 139.

Conceding that the legislature could delegate to the plaintiff the authority to make rules and regulations with reference to the navigation of Humboldt Bay, the penalty for the violation of such rules and regulations is a matter purely in the hands of the legislature.

The act of the legislature in fixing the maximum of such such penalty is of no avail; the vice of the whole matter is in not itself fixing the penalty, and in delegating such legislative power to the plaintiff.

Justice Agnew, in *Locke's Appeal*, 72 Pa. St. 491, 13 Am. Rep. 716, says: "The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes or intends to make its own action depend. To deny this would be to stop the wheels of government."

And it would seem that the establishment of rules as to the navigation of Humboldt Bay would be simply acts of executive administration which the legislature could delegate to the plaintiff as an executive body under the foregoing authority; but when the executive body has made such rules and regulations, it has exhausted all the authority which the legislature had power to confer upon it.

In the case at bar, the legislature attempted to go further than in the case of *Ex parte Cox*, 63 Cal. 21.

Under an act of the legislature approved March 4, 1881, the viticultural health-officer, with the approval of the board of viticultural commissioners, was empowered to declare and enforce rules in the nature of quarantine, to prohibit the importation of diseased vines, etc.; and further provided that

any willful violation of these rules should constitute a misdemeanor.

The petitioner Cox was discharged upon *habeas corpus* by this court, he having been convicted of violating certain of these rules and regulations.

The court said: "For the purpose of local legislation, legislative functions may be conferred upon and exercised by municipal corporations; but the act before us is in no sense a conferring of powers for municipal purposes. The legislature had not authority to confer upon the officer or board the power of declaring what acts should constitute a misdemeanor."

In that case, the legislature delegated the power to the board to make the rules, but expressly provided in the act itself the punishment for the violation of such rules. But in the case at bar, the legislature not only delegated the power to the plaintiff to make the rules and regulations, but went far beyond that, and attempted to delegate the power to the plaintiff to punish for the violation of such rules and regulations. This could not be done.

Let the judgment be affirmed.

PENALTIES — DAMAGES — DISTINCTION BETWEEN: See extended note to *Graham* v. *Beckham*, 1 Am. Dec. 331, 340; *Moore* v. *Colt*, 127 Pa. St. 289; 14 Am. St. Rep. 845, and note. Sum stipulated as damages, when held to be a penalty: *Carter* v. *Strom*, 41 Minn. 522; *Wibaux* v. *Grinnell etc. Co.*, 9 Mont. 154.

Damages as a punishment or example should not be awarded in civil actions for a tort punishable under the criminal law: *State* v. *Grove*, 77 Wis. 448; *Howlett* v. *Tuttle*, 15 Col. 454. A failure to charge the jury that exemplary damages are given by way of punishment cannot be complained of by a defendant against whom a judgment for such damages has been rendered: *Mayer* v. *Duke*, 72 Tex. 445.

LEGISLATURE, POWER OF: *Lawton* v. *Steele*, 119 N. Y. 226; 16 Am. St. Rep. 813. The legislature cannot delegate its authority to make laws by submitting the question of their enactment to a popular vote; but the legislature may confer a power upon a municipal corporation, and authorize its acceptance or rejection by the voters of such municipality: *Johnson* v. *Martin*, 75 Tex. 35; *State* v. *Rapp*, 39 Minn. 65.

[IN BANK.]

NATIONAL BANK v. UNION INSURANCE COMPANY.

[88 CALIFORNIA, 497.]

INSURANCE. — IN CONSTRUING A POLICY OF INSURANCE, the court should lean against that construction which imposes upon the assured the obligation of a warranty.

INSURANCE. — IN DETERMINING WHETHER A STATEMENT IN A POLICY OF INSURANCE IS A WARRANTY on the part of the assured, the entire policy must be considered, and if, from the whole, it appears that such statement was not intended as a warranty, it will not be so construed.

INSURANCE. — UNINTENTIONAL MISSTATEMENT BY AN ASSURED will not be treated as a breach of warranty rendering his policy void, when the policy itself declares that fraud, false swearing, misstatement, or concealment of a material fact by the assured shall render this policy void.

INSURANCE. — CHANGE IN THE POSSESSION OF THE PREMISES INSURED will not avoid a policy of insurance made payable to a mortgagee, if he was not aware of such change, and the policy provided that it should not affect him, unless he should fail to give notice thereof after the change became known to him.

INSURANCE. — MORTGAGEE IS STILL PROTECTED BY A POLICY OF INSURANCE MADE PAYABLE to him, though he has foreclosed the mortgage and purchased the property at the sale, if the mortgagor retains the right to redeem from the sale.

MORTGAGE IS NOT FORECLOSED UNTIL THE MORTGAGOR'S RIGHT OF REDEMPTION IS CUT OFF.

INSURANCE. — MORTGAGE IS NOT PAID BY THE PURCHASE OF THE MORTGAGED PREMISES BY THE MORTGAGEE at the foreclosure sale thereof, and an insurance made payable to him therefor continues in force after such sale.

Smith and Pomeroy, for the appellant.

Denson and Oatman, and Add C. Hinkson, for the respondent.

FOOTE, C. On the twenty-seventh day of December, 1886, the appellant, a fire insurance company, issued to the Johnston Brandy and Wine Manufacturing Company a policy of insurance against loss or damage by fire, upon certain property therein mentioned, to the amount of three thousand dollars. On the face of this policy was attached the following indorsement: —

"Loss (if any) payable to National Bank of D. O. Mills & Co., as herein provided.

"It is hereby agreed that this policy, as to the interests of the mortgagee or trustee only therein, shall not be invalidated by any act or negligence of the mortgagor or owner of the property insured, nor by occupation of the premises for purposes more hazardous than are permitted by the terms of this policy,

nor by any change in title or possession of the property insured; provided, however, that whenever the said mortgagee or trustee shall become aware of any act or negligence of the mortgagor or owner which would, except as to such mortgagee or trustee, invalidate this policy, or of any occupation of the premises for purposes more hazardous than are permitted by the terms of this policy, or of any change in title or possession of the property insured, he will at once notify this company thereof; and provided, also, that he will on demand pay to this company the additional premium charged by this company on account of any increased risk for the entire term of this policy; and failure to so notify this company, or to so pay said additional premium, shall avoid this contract."

It further appears that there was an indorsement made thereon that on the 2d of March, 1887, the National Bank of D. O. Mills & Co. had notified the insurance company that it, as mortgagee, had instituted a suit for foreclosure on the property embraced in the policy, and that the same had been accepted by that company without prejudice to the policy.

On the 25th of May, 1887, the same insurance company issued a policy of insurance of the same character and to the same parties, and the loss made payable in the same way and upon like conditions, for the sum of two thousand dollars. It appears that the property insured was destroyed by two successive fires in the month of September (about the 3d and 20th, in the year 1887), and that the value of the building and other property burned at said times was fully equal in value to the amount of the insurance.

The National Bank of D. O. Mills & Co., to whom the loss was made payable, and who held a mortgage for six thousand dollars on this property, brought this action to recover for the loss, interest, and costs, and obtained judgment as prayed for; from which, and and an order denying a new trial, this appeal is taken.

The appellant urges, in support of its contention, that the first finding of the trial court, "that all and singular the averments of the complaint are true," and the second finding, "that all and singular the matters and things stated in defendant's amended answer and the general averments, and both of the general and special defenses therein set forth, are untrue, excepting," etc., are unsupported by the evidence.

The point made in this behalf is, that at the time of the issuing of the policy dated the 25th of May, 1887, it was made

an express warranty therein by the insured that the premises were then leased to Messrs. Walden & Co., when in fact they were not so leased, and that therefore, by its terms, the policy was void for such misrepresentation.

Conceding that the statement in the policy, if taken by itself, and without reference to other portions of that statement, viz., "it is understood and agreed that the within described premises have been leased by Messrs. Walden & Co.," is an express warranty, under section 2607 of the Civil Code, which reads: "A statement in a policy, of a matter relating to the person or thing insured, or to the risk, as a fact, is an express warranty thereof"; nevertheless, if, taking the entire policy in all its terms and language, it can be perceived that such was not the intention of the parties, such an expression will not be held to be an express warranty. And where there is any doubt as to the construction to be given to language in such a matter, "the court should lean against that construction which imposes upon the assured the obligation of a warranty": *First Nat. Bank* v. *Hartford Fire Ins. Co.*, 95 U. S. 679.

In another part of this policy there occurs this clause: "Fraud, false swearing, misrepresentation, or concealment of a material fact by the insured, whether in the application for this policy, proofs of loss, or otherwise, shall render this policy void."

Thus it seems that it is the intentional misstatement or concealment of a material fact which rendered the policy void, and not the mere fact that a statement therein as to the material matter is untrue. The evidence in this case shows that there was no intentional misstatement as to the leasing of the property to Walden & Co. These parties did have a verbal lease of the premises up to the 30th of April, 1887, and this fact, and the further fact that the language of the policy is "have been" leased, goes far to create the impression that as the lease had been so recent, the Johnston Brandy and Wine Manufacturing Company, having that in mind, might have been of the impression that these parties still had a lease, or perhaps meant to say that they had had a lease.

This view of the matter in hand seems to be in accord with previous adjudications of the appellate court. In *Wheaton* v. *North British etc. Ins. Co.*, 76 Cal. 419, 9 Am. St. Rep. 216, a somewhat similar question was involved, and it was contended that the statement of the insured, in his application,

as to the value of the property, was an express warranty. The alleged warranty was in this language: "Special reference being made to assured's application and survey No. 261,707, which is his warranty, and a part hereof." In another part of the policy there was this clause: "If any false representation is made by the assured of the condition, situation, or occupancy of the property, or any over-valuation, or any misrepresentation whatever, either in a written application or otherwise, ... this policy shall become void."

The appellate court said (p. 422): "In *Helbing* v. *Svea Ins. Co.*, 54 Cal. 156, 35 Am. Rep. 72, it was held that a provision in a policy of insurance that the application shall be considered a warranty, and if the property insured is over-valued in it the policy shall be void, applies only where the statements as to value are intentionally false; that the question of fraud is one of fact; that, although, where the discrepancy between the statement in the application and the actual value of the property is so great as to convey the conviction of fraud to the reasonable mind, the jury may and ought to find fraud, yet, where the discrepancy is very considerable, the jury may find the application not to have been fraudulent, even in the absence of explanatory evidence. Moreover, the language of the provision in the policy here sued on, that if any false representation is made by the assured, etc., the policy shall become void, when read as a whole, very clearly shows that a willful misrepresentation as to the value of the property, or one made with such gross and reckless carelessness as in the law would be treated as willful, was in the contemplation of the parties. If so, the previous clause does not make the valuation a warranty. Even when the statements in the application are declared to be warranties, they will not be regarded as such if qualified by other stipulations, which afford a fair inference that the parties themselves did not so intend them."

By the findings it has been determined by the trial court as a fact that the assured did not intentionally misrepresent any fact to exist, material to the risk, which did not exist, and as heretofore stated, we think the findings on this point are sustained by the evidence.

The appellant claims also that the policy of the 27th of December, 1886, was void as to the Johnston Brandy and Wine Manufacturing Company, because the lessees, Walden & Co., were warranted to be the tenants then, and in posses-

sion, and that when these tenants abandoned the possession of the premises without notice given by the assured to the company, the policy became void.

This statement of the existence of the lease to Walden & Co., if it stated such existence, was not a warranty in either of the policies, as we have seen, and the change of possession, if it took place without notice, did not concern the plaintiff here, for it was not to be affected by any act of this kind, unless notice was brought home to it of such change of possession, and it further failed to notify the company. The evidence is sufficient to show that the plaintiff had no knowledge of any change in the possession of the property from Walden & Co. back to the Johnston Brandy and Wine Manufacturing Company, nor that the premises were vacated or unoccupied, even conceding that such was the fact, under a proper interpretation of the language of the policies on these points. If it had no such knowledge, it was not bound to communicate it, and was protected by the indorsement on the policy.

It follows, therefore, that unless the plaintiff here has lost its right by reason of something which is shown by the evidence to have transpired before the loss, by which the rights of the plaintiff under the terms of the indorsement on the policies are affected, there was no error committed in the rendition of the judgment and the refusal to grant a new trial.

In this connection, the appellant contends "that the interest of a mortgagee in insured property is measured by the amount of his mortgage debt at the time of the loss; and if at such time his debt is extinguished, either wholly or in part, his interest as a mortgagee is also extinguished, either entirely or *pro tanto*"; and that "the mortgage debt" of the plaintiff "having been *pro tanto* extinguished to the extent of six thousand dollars by reason of the foreclosure sale and the application of the proceeds to the mortgage indebtedness, the mortgage clause operated as a protection to the plaintiff only to the extent that its indebtedness remained unpaid after the sale."

It is true that the plaintiff proceeded to foreclose the mortgage, and that of this intention the defendant had notice; and that the property was bought in at sheriff's sale for the plaintiff, a credit of six thousand dollars made upon the judgment, and a certificate of purchase issued. But when the

fire occurred, the deed had not been executed and the legal title had not been passed, the time for redemption not having elapsed. It is not pretended that there was any payment of money on the judgment. The bid of the plaintiff was credited on the judgment, and a receipt given to balance the sheriff's account of the foreclosure sale. But there would never have been any actual payment of money received by the plaintiff unless it had been paid in upon the redemption of the property, or it had, upon the failure of redemption, received a deed. In fact, the plaintiff never got a deed until after the loss had occurred, no redemption having taken place.

In this connection, the argument by the appellant is, that the legal effect of the foreclosure was to pay the plaintiff's debt *pro tanto*, and to that extent to extinguish its interest as a mortgagee in the insured property.

It has been held by the appellate court of this state "that the foreclosure of a mortgage" embraces the sale of the property, and the execution of the sheriff's deed, as well as the decree of the court ordering the sale. A mortgage cannot be said to be foreclosed, even in the sense of our code, until the mortgagor's right of redemption is cut off: *Goldtree* v. *McAlister*, 86 Cal. 105. Tested by this rule, since the time for redemption had not elapsed when the foreclosure took place and loss occurred, and no deed had been made to the mortgagee, there had been no foreclosure of the mortgage. And so far as the question of payment of the mortgage debt is concerned, as bearing upon the matter of the extinguishment *pro tanto* of the insurable interest of the mortgagee, it was held, in *Bragg* v. *New England Mut. Fire Ins. Co.*, 25 N. H. 289, that where in a policy such as this the insurance is effected on the property of one person, and the loss made payable to the mortgagee, another person, that even upon a foreclosure, where the property is sold and a deed made to the mortgagee, there is not such an alienation of the title as to forfeit the right to recover on the policy. For if the mortgagee thus acquires an additional interest in the property, it is a potential reason why he would be more interested in protecting the property insured; and such a change of title, although within the language of the proviso against change of title or sale, or transfer, is not within its spirit and purpose, and will not vitiate the policy; and the instance of a case where the title becomes absolute in a mortgage by foreclosure

is cited by Mr. May, in his work on insurance, to illustrate this principle: May on Insurance, sec. 275. To much the same effect is it held in *Heaton* v. *Manhattan Fire Ins. Co.*, 7 R. I. 508.

Unless the right of redemption has been extinguished, there is no payment *pro tanto* by the mortgagor at the sale: *West* v. *Chamberlin*, 8 Pick. 338. Where no deed has passed, as we have seen, the foreclosure is incomplete, and no payment has been made.

If the deed had been made when the fire occurred, and the right of redemption had been cut off, there would have been a payment made by the bid. But even then, under the authorities, it seems as if there would have been no change of title or extinguishment of interest which would have affected the policy.

For these reasons, we advise that the judgment and order be affirmed.

BELCHER, C., and VANCLIFF, C., concurred.

The COURT. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

BEATTY, C. J., being disqualified, did not participate in the above opinion.

Rehearing denied.

INSURANCE — CONSTRUCTION OF POLICY. — Policies of insurance are to be construed with reference to the intent of the parties: *Continental Ins. Co.* v. *Kyle*, 124 Ind. 132; 19 Am. St. Rep. 77. A policy of insurance is construed most strongly against the insurer: *Philadelphia T. Co.* v. *British A. Assur. Co.*, 132 Pa. St. 236; 19 Am. St. Rep. 596, and note; *Bonnert* v. *Pennsylvania Ins. Co.*, 129 Pa. St. 558; 15 Am. St. Rep. 739. To avoid a policy of insurance for breach of warranty, the burden of proof is upon the insurer, and a substantial breach must be shown: *Phœnix Ins. Co.* v. *Pickel*, 119 Ind. 155; 12 Am. St. Rep. 393, and extended note. In construing warranties in a policy of insurance, the intention of the parties is the prime object to be reached: *Hoose* v. *Prescott etc. Insurance Co.*, 84 Mich. 309.

INSURANCE — MORTGAGE — CHANGE OF POSSESSION. — Where a mortgagor agrees to insure the premises for the benefit of the mortgagee, but takes a policy in his own name, and without the mortgagee's knowledge, equity will give a lien to the mortgagee: *Nordyke* v. *Gery*, 112 Ind. 535; 2 Am. St. Rep. 219. The owner of insured property mortgages it with notice to insurer, sells the property, and assigns the policy to vendee, who obtains assent of the insurer; the latter, knowing nothing of the mortgage, cannot set up the previous forfeiture by the assignor to defeat the assignee's claim: *Continental Ins. Co.* v. *Munns*, 120 Ind. 30.

DUNSMOOR *v.* FURSTENFELDT.

[88 CALIFORNIA, 522.]

MONEY CEASES TO BE HELD IN CUSTODY OF LAW when the court makes an order for its distribution to the parties whom it finds entitled thereto, and directs its officer to pay such moneys to them.

GARNISHMENT OF A RECEIVER OR OTHER OFFICER OF A COURT IS EFFECTIVE WHEN the moneys in his hands have been distributed by the court and directed to be paid in specified sums to the several parties entitled thereto, and the garnishment is of the interest of one of such parties.

DEBT, WHAT IS. — IF MONEYS IN CUSTODY OF LAW ARE DISTRIBUTED by an order of court, and a definite sum is directed to be paid by the clerk or other officer having possession thereof to a person designated, such officer must be regarded as owing a debt to such person, within the meaning of the law authorizing the garnishment of any person owing debts to the defendant.

Wilson and Bulla, and George A. Rankin, for the appellant.

Victor Montgomery, for the respondent, Furstenfeldt.

VANCLIEF, C. The plaintiff (clerk of the superior court) brought this action to compel the defendants, Furstenfeldt and Geinger, to interplead as to their respective adverse claims to be paid a sum of money in the possession and custody of the plaintiff, which he was willing and ready to pay to the one to whom the court should determine it was due.

The court adjudged that Furstenfeldt was entitled to the money, and Geinger brings this appeal from the judgment upon the judgment roll, and contends that upon the facts found the judgment should have been in his favor.

The material facts found are substantially as follows: 1. In January, 1888, Peter Eschelbach made an assignment of his property to one Lewis, for the benefit of his creditors; 2. Thereafter, Sichler, one of the creditors of the insolvent, brought an action in the superior court of Los Angeles County against Lewis, the assignee, to compel him to account to the creditors; 3. In this action against the assignee he was ordered by the court, April 11, 1889, to deposit with the clerk thereof, Dunsmoor, plaintiff herein, about $8,000, to be held pending the litigation as to the proper distribution thereof among the creditors, and thereupon the said sum was so deposited by the assignee; 4. On the same day, April 11, 1889, the court ordered a distribution of said sum among the creditors, one of whom was Antone Miller, to whom the court ordered the clerk, plaintiff herein, to pay from said money the sum of $305.32; 5. On July 3, 1889, Miller assigned all his

right and title to the last-mentioned sum, then in the custody of the clerk, to the defendant Furstenfeldt, who, on the following ninth day of July, demanded it of the clerk, but the clerk then refused, and every since has refused, to pay the same to Furstenfeldt; 6. On the sixth day of April, 1889, the defendant Geinger obtained a judgment in the superior court of San Francisco against Antone Miller for the sum of $1,319, upon which execution was issued to the sheriff of Los Angeles County on June 18, 1889, and was duly served by copy and garnishment upon Dunsmoor, the plaintiff, and upon Lewis, the assignee of the insolvent, on June 20, 1889; 7. Dunsmoor, on June 21, 1889, answered to the garnishment notice that he held, subject to the order of the court, $305.32, which had been distributed, by order of the court in the case of *Sichler* v. *Lewis*, to Antone Miller, as above stated; 8. On July 1, 1889, defendant Geinger demanded of Dunsmoor said sum of $305.32, which the latter refused to pay, and which he still holds in his custody, subject to the judgment of the court in this action, as alleged in his complaint herein; 9. Thereafter the defendant Furstenfeldt petitioned the superior court of Los Angeles County for an order requiring Dunsmoor to pay to him said sum of $305.32, on the ground that it had been assigned to him by Antone Miller, to whom it had been ordered to be paid in the case of *Sichler* v. *Lewis, Assignee*, but the court, after "due hearing," denied his petition, "upon the ground that said court had no further control or jurisdiction over said sum of money, by reason of the order of distribution previously made by said court." Whether Geinger had notice of this petition is not stated, nor does it appear that he participated in the hearing.

It will be seen that the garnishment by virtue of Geinger's execution was thirteen days prior to the assignment by Miller to Furstenfeldt, and therefore if the money ($305.32) in the hands of Dunsmoor, or a debt from Dunsmoor to Miller for the same sum of money growing out of the transactions, was subject to the garnishment, the judgment should have been in favor of the appellant; otherwise, the judgment in favor of Furstenfeldt should be affirmed.

Section 544 of the Code of Civil Procedure provides that "all persons having in their possession, or under their control, any credits or other personal property belonging to the defendant, or owing any debts to the defendant, at the time of service upon them of a copy of the writ and notice, as pro-

vided in the last two sections, shall be liable to the plaintiff for the amount of such credits, property, or debts, until the attachment be discharged, or any judgment recovered by him be satisfied."

Respondent contends,—1. That no part of the money in the possession of Dunsmoor belonged to the defendant Miller; 2. That the money of which Dunsmoor acquired the possession by the order of the court was at the time of the service of the writ in the custody of the law, and therefore not subject to garnishment; and 3. That Dunsmoor owed no debt to Miller.

1. We think it must be conceded that the eight thousand dollars, while in the custody of Dunsmoor, did not belong to the creditors of the insolvent. Lewis, the assignee of the insolvent, held it in trust for those creditors, to be distributed among them, ratably, in payment of their several demands against the insolvent. In his hands, no one of the creditors could have lawfully claimed any part of the money as his individual personal property, nor could all the creditors, jointly, have so claimed all the money, as it was not a special deposit by or for them: Wade on Attachment, secs. 329–407. The transfer of the money from the assignee to Dunsmoor, in obedience to the order of the court, gave the creditors no more title to it than they had before.

2. Whether the money was ordered to be delivered to Dunsmoor in his official capacity as clerk of the court, or as a receiver or master in chancery, he held it for the same purposes (though not by the same title) for which it had been held by the assignee, and for no other purpose. For such purposes, and until they were accomplished, no doubt, the money was in the custody of the law, in the ordinary sense of the term; but so far as the court was concerned, such purposes were fully accomplished by the final decree in the case of *Sichler* v. *Lewis, Assignee*, determining the share of the money to which each creditor was entitled, and ordering Dunsmoor (as clerk or receiver) to pay to each creditor a specific certain sum from the fund. That was the end of the judicial proceedings in the case of *Sichler* v. *Lewis*. The execution of the decree by paying the money to the creditors was all that remained to be done. The only reason assigned by the authorities for the rule prohibiting the attachment of property in the custody of the law is, that such attachment would generally delay and embarrass judicial and other official proceedings in the administration of such property; and

that this is a sufficient reason for the rule, as applied to all judicial proceedings in regard to such property, is generally admitted, and to this extent the weight of authority admits no exception to the rule. But, according to a great preponderance of the modern cases, there are some exceptions to the rule as applied to property in the custody of purely executive officers, based upon the maxim that the rule should not be applied "when the reason of the rule ceases": Civ. Code, secs. 3509, 3510. After speaking of the rule and the exceptions thereto in Maryland, Mr. Wade, in his work on attachment, section 424, says: "It is elsewhere held, and as it appears with considerable unanimity, that when defendant has a right to a certain distributive share of the fund in the hands of a receiver, master in chancery, or trustee of court, the officer may be effectually garnished by a creditor of the party so entitled, after the court has ordered it to be paid. The authorities seem to concur in holding receivers and similar officers liable to garnishment when they have in their hands a definite sum to which the defendant or judgment debtor is clearly entitled, and the officer has nothing more to do with the fund than to pay it over. Some of them may go beyond, but none, so far as they have been examined, fall short of, this conclusion." See also Freeman on Executions, sec. 129; *Gaither* v. *Ballew*, 4 Jones, 488; 69 Am. Dec. 764.

In speaking of assignees in bankruptcy and insolvency, and after admitting that the property in their hands is not subject to garnishment before an order of distribution, the same author (sec. 423) says: "It is another matter when, in the course of the administration of his duties, the assignee has in his hands a sum due one of the creditors, and a creditor of such creditor seeks to charge him as garnishee in respect thereto. In such case the exemption could be maintained, if at all, only on the ground of the official capacity in which the money of the defendant was held. It is no longer the property of the assignee. In case of his refusal to pay it over to the party entitled thereto, the latter could maintain an action for it. It is not apparent how, in such case, the assignee would occupy ground more favorable to his exemption than would a sheriff in possession of a surplus due an execution defendant." As to sheriffs, see Wade on Attachment, sec. 421.

In cases of garnishment of executors and administrators in respect to the property of legatees and heirs, the exception to

the rule of exemption applies, after an order of distribution of the property has been made whereby the share or portion of the defendant in attachment is rendered definite and certain: Wade on Attachments, secs. 425, 426; Freeman on Executions, sec. 131; *Estate of Nerac*, 35 Cal. 392; 95 Am. Dec. 111. I think the case at bar comes fairly within the exception to the rule that property in the custody of the law is not subject to garnishment.

3. Having conceded that no part of the money in the hands of Dunsmoor — that is, no particular coins or bank bills — could be said to be the personal property of Miller, a delivery of which to himself he was entitled to demand of Dunsmoor, it remains to answer the objection that "Dunsmoor owed no debt to Miller."

If, as contended and conceded, no particular money in Dunsmoor's hands belonged to Miller, and that Dunsmoor might have paid Miller the sum ordered by the court to be paid him in any lawful money, it would seem to follow that Dunsmoor owed Miller $305.32; and surely what Dunsmoor owed Miller was a debt (*Rodman* v. *Munson*, 13 Barb. 197) the payment of which Miller could have enforced. Indeed, it was a debt in the strict legal sense, — a judgment, — a debt of record: Burrill's Law Dict. For a full exposition of the word "debt," as used in law, and particularly in statutes, see *New Jersey Ins. Co.* v. *Meeker*, 37 N. J. L. 300, and authorities there cited. Any kind of obligation of one man to pay money to another is a debt. "A debt signifies what one owes. There is always some obligation that it shall be paid; but the manner in which it is to be paid, or the means of coercing payment, do not enter into the definition": *Rodman* v. *Munson*, 13 Barb. 197. Perhaps Miller might have coerced payment by motion in the same court that ordered the payment. If not, he certainly could have recovered the debt by action upon the judgment rendered in the case of *Sichler* v. *Lewis*.

I think the judgment should be reversed, and that the lower court should be directed to render judgment on the findings of fact in favor of appellant.

FOOTE, C., and TEMPLE, C., concurred.

THE COURT. For the reasons given in the foregoing opinion, the judgment is reversed, and the court below is directed to render judgment on the findings of fact in favor of the appellant.

ATTACHMENT AND GARNISHMENT. — Property *in custodio legis* is not subject to attachment: *Stevenson* v. *Palmer*, 14 Col. 565; 20 Am. St. Rep. 295, and note. Wages in the hands of the sheriff, when not subject to garnishment: *Cox* v. *Bearden*, 84 Ga. 304; 20 Am. St. Rep. 359. Money in the custody of the law is not subject to attachment: *Bowden* v. *Schatzell*, 1 Bail. Eq. 360; 23 Am. Dec. 170. Money received by sheriff on execution cannot be attached in his hands: *Dawson* v. *Holcomb*, 1 Ohio, 275; 13 Am. Dec. 618. For attachment of money in officer's hands, see note to *Shinn* v. *Zimmerman*, 55 Am. Dec. 264. A writ of garnishment served on the clerk of the court is not a lien on the funds in the hands of the sheriff: *Sweetzer* v. *Claflin*, 74 Tex. 667.

[IN BANK.]

SMITH *v.* OLMSTEAD.

[88 CALIFORNIA, 582.]

WILLS. — AS TO THE INTEREST OF A PRETERMITTED HEIR, his ancestor must be regarded as dying intestate.

WILLS — PRETERMITTED HEIR. — A POWER OF SALE IN A WILL, and a sale made thereunder, though confirmed by a court, do not affect the share of a pretermitted heir, when the sale was not made to pay decedent's debts, nor charges accruing in the course of administration. This rule is not abrogated by a statute declaring that when an authority is given in a will to sell property the executor may sell any property of the estate without an order of the court, but that no title passes until the sale is confirmed by the court.

Chapman and Hendrick, Cope, Boyd, and Fifield, John R. Jarboe, W. S. Goodfellow, Estee, Wilson, and McCutcheon, E. R. Taylor, Garber, Boalt, and Bishop, Stanly, Stoney, and Hayes, E. J. Pringle, Smith and Pomeroy, Auguste Comte, Jr., Henry C. Campbell, A. H. Loughborough, Mastick, Belcher, and Mastick, Page and Eells, Craig and Meredith, and Olney, Chickering, and Thomas, for the appellants.

E. Edgar Galbreth, and Anderson, Fitzgerald, and Anderson, for the respondents.

DE HAVEN, J. This is an action for the purpose of determining conflicting claims to real property.

The record shows that one Z. B. Smith, now deceased, in his lifetime made a last will, by which, after directing the payment of his debts, he, in terms, gave to his wife all of his property, with "absolute power to sell any or all of said real and personal property, at public or private sale, with or without advertisement, and without application to any court, and without approval or authority of any court whatever." In a subsequent clause the wife was also named as executrix of

the will. She duly qualified as such, and sold to the defendants the property described in the complaint. Such sale was made without any previous order therefor; but was afterwards confirmed by the court in which the administration of her deceased husband's estate was pending. The land was community property. The record does not show that the sale was necessary for any of the reasons stated in section 1536 of the Code of Civil Procedure; that is, in order "to pay the allowance of the family, or of the debts outstanding against the decedent, or the debts, expenses, or charges of administration, or legacies."

The plaintiffs are minor children of the said Z. B. Smith, deceased, and are not provided for in said will, nor does the will show that the omission to provide for them was intentional.

There has never been any distribution of this property, and the administration of the estate of said Smith is still pending.

The judgment of the court below was in favor of plaintiffs, and the defendants appeal. This judgment was affirmed by Department One of this court, on January 25, 1890, but a hearing in Bank was afterwards ordered, and the case is now before us for determination.

The question for decision is, whether, upon the facts as here stated, the power of sale contained in the will is so far operative against the plaintiffs that a sale made under it, and confirmed by the court, transferred to the defendants the title to the land in controversy. To determine this, a brief reference to the language of the law relating to wills, and the right to succession of property of a decedent, in the absence of a will disposing of it, is necessary.

By section 1307 of the Civil Code it is provided that where a testator omits to provide in his will for any of his children, unless it appears that such omission was intentional, such child "must have the same share in the estate of the testator as if he had died intestate, and succeeds thereto, as provided in the preceding section." That is, "the child succeeds to the same portion of the testator's real and personal property that he would have succeeded to if the testator had died intestate": Civ. Code, sec. 1306.

We are unable to construe these sections otherwise than as declaring that the pretermitted child succeeds immediately by operation of law to the same portion of the testator's real property as if no will had been made; that as to such portion

the testator is to be regarded as dying intestate, and its succession is directed by law, and not by the will. And as a necessary legal consequence of this construction, it would follow that every provision in the will directly or indirectly attempting to dispose of such portion of the estate, except for the discharge of the decedent's debts, or other charges accruing in due course of administration, is inoperative as against such child.

As to the rights of a pretermitted child under these sections, this court has heretofore held: "In other words, the child succeeds to the same portion of the testator's real and personal property that he would have succeeded to if the testator had died intestate": *Estate of Wardell*, 57 Cal. 489.

Sections 16 and 17 of the act concerning wills (Hittell's General Laws, 1086), and section 1 of the statute of descents and distributions (Hittell's General Laws, 323), are substantially the same as the provisions of our Civil Code relating to the same subjects; and this court, in *Pearson* v. *Pearson*, 46 Cal. 610, basing its decision on these statutes, held, explicitly, that the pretermitted child takes the same share in the estate, and holds by the same title, as though the testator had died intestate.

Now, in the case of a person dying intestate, his estate descends and vests immediately in his heirs, subject only to the payment of the debts of decedent, the expenses of administration, and the family allowance. This is not only clear from sections 1383, 1384, 1386, and 1402 of the Civil Code, but was so expressly held by this court in *Brenham* v. *Story*, 39 Cal. 188, under statutes substantially the same, the court saying: "Upon the death of the ancestor the heir becomes vested at once with the full property, subject to the liens we have mentioned; and subject to these liens and the temporary right of possession of the administrator, he may at once sell and dispose of the property, and has the same right to judge for himself of the relative advantages of selling or holding that any other owner has."

The respondents in this case were, immediately upon the death of their father, clothed by operation of law with such a title to the property in controversy, and this being its nature and extent, it is clear that such title was not divested by the sale made by the executrix of their father's will, under the circumstances disclosed by the record in this case. A title to property which is so full and complete that its possessor has

"the same right to judge for himself of the relative advantages of selling or holding that any other owner has" cannot co-exist with the right of another to transfer such property at discretion, and the power exercised by the executrix in this case, being inconsistent with the title which the law vested in the respondents upon the death of the father, cannot be upheld.

These views are in harmony with the decisions of other states, where statutes relating to wills and right of succession are similar to our own: See *Northrop* v. *Marquam*, 16 Or. 173; *Smith* v. *Robertson*, 89 N. Y. 558. But it is urged by appellant that these cases are not in point, because in neither of the states in which the decisions were made was there a statute similar to section 1561 of the Code of Civil Procedure, which provides that when "authority is given in the will to sell property, the executor may sell any property of the estate without order of the court, and at either public or private sale, and with or without notice, as the executor may determine," but that "no title passes unless the sale be confirmed by the court"; and it is claimed that the sale here, having been confirmed by the court, is valid under that section. But we think it is manifest that in determining the question whether in judgment of law authority to sell has in fact been given to an executor, the section can have no application. It is equally clear that the authority to sell therein referred to must be held to include only such a one as is operative and binding upon the person against whom it is asserted; and unless such an authority can be found in the will, when such will is read and construed with reference to the law which determines its meaning and legal effect, it must be held that it was not given,— and in that case there is nothing upon which this section of the code can act.

The case of *Coates* v. *Hughes*, 3 Binn. 498, cited and relied on by appellants, is not in conflict with the views we have announced. The power under consideration there was confined to a sale for the payment of the debts of the testator, and it appeared that there was a necessity for the sale for such purpose, and the court held, and we think rightly, that such a power was operative. The reason why, in such a case, the power of sale would be operative, is apparent. The child who succeeds to the estate of his ancestor, by inheritance, takes it subject to the payment of the debts of such ancestor, and his right of succession is in no wise affected by a provision in a will which goes no further than to authorize what the law

would in any event direct to be done, if necessary to discharge such lien. In such a case the executor is only clothed with the ordinary powers incident to the administration of the estate, — in fact, the precise power which the law gives an administrator of the estate of an intestate.

The order of confirmation imparted no validity to the sale in this case; it only adjudicates that the power contained in the will had been followed, and that the sale was for a fair price.

We are satisfied with the conclusion reached in Department One.

Judgment affirmed.

HARRISON, J. (concurring). I concur in the order affirming the judgment, both for the reasons expressed in the opinion of Mr. Justice De Haven, and also upon the following considerations: —

Section 1402 of the Civil Code provides that "upon the death of the husband, one half of the community property goes to the surviving wife, and the other half goes to his descendants, ... subject to his debts, the family allowance, and expenses of administration." These are the "purposes of administration," referred to in section 1384 of the Civil Code, and are also the objects for which the court is authorized, under section 1536 of the Code of Civil Procedure, to direct a sale of the property of the decedent. The right of the children and the right of the surviving wife to the community property exist by virtue of the same section of the code, and are declared in identical words; and inasmuch as it is the settled rule that the right of the surviving wife to her half of the community property vests in her immediately upon the death of the husband (*Estate of Silvey*, 42 Cal. 210), it must also be held that the right of the children to their half of the same property vests in them at the same time.

In *King* v. *La Grange*, 50 Cal. 328, it was held that a power of sale in the will did not authorize a conveyance by the executor of the wife's share of the community property, and that a conveyance by the executor, under such power, of the real estate of the deceased did not have the effect to transfer the interest of the wife as the survivor of the community. It is true that the conveyance in that case was only of the "right, title, and interest" of the decedent in the property, but the decision in the case does not turn upon this distinction, and in

reality such a distinction does not exist. At the date of the conveyance, the testator, being dead, had of course no "right, title, or interest" in the property; and the conveyance by the executor, under the power contained in the will, being like a conveyance under any other power of attorney (*Larco* v. *Casaneuava*, 30 Cal. 560), would necessarily be limited to such right, title, and interest as existed in his constituent at the date of his death, the point of time when the authority of the executor came into existence. If a conveyance under a power of sale given in the will is inoperative to transfer the interest of the wife, it must be equally inoperative to transfer the interest of the children. In accordance with the principles established by the decision in *King* v. *La Grange*, 50 Cal. 328, it is the usual, if not the invariable, custom of conveyancers in this state, when community property of a decedent is sold by the executor, under a power given by the will, to require a release or conveyance of the same property from the surviving wife. This rule or custom was followed in the present case, since it appears from the record that the purchaser took a deed of the land in question from the surviving wife individually, as well as in her representative capacity.

Rehearing denied.

WILLS — EFFECT OF OMISSION TO PROVIDE FOR A CHILD IN WILL. — A pretermitted child is entitled to the same share of his father's estate that he would have had if there had been no will: *Woodard* v. *Spiller*, 1 Dana, 180; 25 Am. Dec. 139; note to *Wilson* v. *Foskit*, 39 Am. Dec. 740–744; *Ward* v. *Ward*, 120 Ill. 111.

[IN BANK.]

EX PARTE SPEARS, ON HABEAS CORPUS.

[88 CALIFORNIA, 640.]

FUGITIVE FROM JUSTICE — HABEAS CORPUS. — The governor of the state has no authority to issue his warrant for the arrest of an alleged fugitive from justice, unless he has been charged with crime in a state whence it is alleged he has fled, either by indictment or affidavit; and whether he is so charged is a question of law, always open, on the face of the papers, to judicial inquiry, on an application for his discharge on *habeas corpus*.

FUGITIVE FROM JUSTICE IS NOT CHARGED WITH A CRIME AUTHORIZING THE GOVERNOR TO ISSUE A WARRANT for his arrest, when the only charge against him is contained in an affidavit, stating that the affiant has reason to believe, and does believe, that he has committed a certain crime, naming it.

LAWS OF ANOTHER STATE. — Though on a hearing on *habeas corpus* a single section of the criminal code of another state is read in evidence, the court will look to the whole code, to ascertain what the law of the state is upon the subject before it.

G. E. Riley, J. F. Riley, and J. I. Caldwell, for the petitioner.

Attorney-General Hart, contra.

DE HAVEN, J. The petitioner is before the court upon a writ of *habeas corpus*, the return to which shows that he is in the custody of the sheriff of Nevada County by virtue of a warrant for his arrest as a fugitive from justice, issued by the governor of this state in compliance with a requisition from the governor of the state of Alabama.

The governor of this state was not authorized to issue his warrant for the arrest of petitioner, unless it was shown to him that the petitioner is substantially charged with a crime in the state from which it is alleged he has fled, and the law of Congress (Rev. Stats., sec. 5278) requires that this fact must be made to appear by a copy of an indictment found, or an affidavit made before a magistrate of such state, certified as authentic by the governor of the state making the demand: *Roberts* v. *Reilly*, 116 U. S. 95. And whether the alleged fugitive is so substantially charged with a crime is a question of law, which is always open, upon the face of the papers, to judicial inquiry, on an application for discharge under a writ of *habeas corpus: Roberts* v. *Reilly*, 116 U. S. 95.

We have before us the copy of the affidavit which accompanied the requisition of the governor of Alabama, and the sole question for determination is, whether such affidavit substantially charges the petitioner with having committed any crime which would have justified his arrest in that state. The affidavit purports to have been made by one J. C. Orr, and charges that he, Orr, "has reason to believe, and does believe, that within twelve months before making this affidavit in said county, W. A. Spears embezzled, or fraudulently converted to his own use, one car-load of mules, or the value of the same, to wit, of two thousand dollars, the personal property of J. C. Orr, which came into W. A. Spears's possession by virtue of an employment to sell said mules."

It is obvious that this affidavit does not directly charge that petitioner has committed any offense, and it would be a dangerous precedent to establish that any man may be deprived

of his liberty and removed to another state upon such an accusation. The statement therein, that affiant "has reason to believe, and does believe," that petitioner embezzled, or fraudulently converted to his own use, the property mentioned, is not the statement of any fact, and for that reason the affidavit is fatally defective. The language of the supreme court of Michigan in *Swart* v. *Kimball*, 43 Mich. 451, is applicable here: "Charges are not verified by an affidavit that somebody is informed and believed that they are true. This is mere evasion of the law; the most improbable stories may be believed of any one, and the man most free from any reasonable suspicion of guilt is not safe if he holds his freedom at the mercy of any man three hundred miles off, who will swear that he has been informed and believes in his guilt."

That such an affidavit is insufficient to support the issuance of a warrant under the laws of this state was held by this court in *Ex parte Dimmig*, 74 Cal. 165. We there said: "But a mere affidavit in the form of an information, containing no evidence, and followed by no deposition stating any fact tending to show guilt, is insufficient to support a warrant. The liberty of a citizen cannot be violated upon the mere expression of an opinion under oath that he is guilty of a crime."

In *Ex parte Smith*, 3 McLean, 121, the affidavit accompanying the requisition of the governor of Missouri for the arrest of Smith was made by one Boggs, and charged "that on the night of the sixth day of May, 1842, while sitting in his dwelling, in the town of Independence, in the county of Jackson, he was shot, with intent to kill, and that his life was despaired of for several days, and that he believes, and has good reason to believe, from evidence and information now in his possession, that Joseph Smith, commonly called the Mormon Prophet, was accessary before the fact of the intended murder and that the said Joseph Smith is a citizen and resident of the state of Illinois."

This affidavit was held insufficient as a basis for the governor's warrant, upon the ground, among others stated, that it was not positive in its charge. See also 1 Bishop's Crim. Proc., sec. 222.

It is true that the courts are not authorized to discharge a prisoner because of formal defects in the indictment or affidavit charging the offense, and that the sufficiency of the charge, as a matter of technical pleading, is to be tried and determined in the state from which the alleged fugitive fled:

Davis's Case, 122 Mass. 329; *Kentucky* v. *Dennison*, 24 How. 107.

But the defect in the affidavit before us is not a merely formal one. The objection to its sufficiency is substantial, and it is, that in judgment of law it does not make any charge at all.

Upon the hearing, the attorney-general read as evidence, from a printed volume of the statutes of that state, section 4204 of the Criminal Code of Alabama, from which it appears that a warrant of arrest for a misdemeanor may be issued upon an affidavit in which the affiant states "that he has probable cause for believing, and does believe," that such offense has been committed, and it was argued that inasmuch as no other section of this code was formally offered in evidence, that the court must presume that the affidavit here is sufficient under the laws of that state. We think, however, that we are not confined to this particular section, which is not applicable here, but are authorized to look into the volume in which it appears, and upon such examination we find the law of that state to be, what in the absence of all evidence we would presume it to be, substantially like that of our own state, so far as relates to arresting one charged with a felony. It follows that the affidavit before us must be regarded as insufficient to justify the issuance of the executive warrant of arrest under which the petitioner is detained in custody.

Petitioner discharged.

PATERSON, J. (dissenting). I am unable to concur. "The warrant of the governor is *prima facie* evidence, at least, that all necessary legal prerequisites have been complied with" (Church on Habeas Corpus, sec. 480), and the petitioner has not made it appear to my satisfaction that the courts of Alabama could not hold him for examination on the affidavit charging him with embezzlement.

EXTRADITION. — A fugitive from justice illegally arrested in one state for an offense committed in another will not be released on *habeas corpus: Ex parte Barker*, 87 Ala. 4; 13 Am. St. Rep. 17, and note. An extradition warrant need only show unmistakable facts as to the fugitive character of the party sought to be extradited: *Ex parte Stanley*, 25 Tex. App. 372.

EXTRADITION, WARRANT OF, NEED NOT SHOW that the crime charged is a crime against the law of the demanding state: *Ex parte Stanley*, 25 Tex. App. 372.

EXTRADITION — HABEAS CORPUS. — The merits of the case cannot be inquired into on *habeas corpus;* only the sufficiency of the papers and the identity of the prisoner: *Kurtz* v. *State*, 22 Fla. 36; 1 Am. St. Rep. 173, and note.

CASES

IN THE

COURT OF ERRORS AND APPEALS

OF

DELAWARE.

MURPHY *v.* MAYOR AND COUNCIL OF WILMINGTON.

[6 HOUSTON, 108.]

MUNICIPAL CORPORATIONS. — DIVERSION OF SMALL AND PRIVATE WATER-COURSE by a city for the purpose of drainage and sewerage, with the consent and approval of the land-owners through whose land it runs, is not an exercise of the right of eminent domain.

MUNICIPAL CORPORATIONS — LOCAL ASSESSMENTS FOR IMPROVEMENTS — INJUNCTION TO PREVENT COLLECTION OF. — The expense of local improvements in a town or city may be met by local assessments, in whole or in part, and equity will not enjoin the collection of such assessments except under special circumstances, such as leave the complainant without any remedy at law, and bring his case under some of the recognized heads of equity jurisdiction, or where it is clear that the tax has been imposed without authority and is absolutely void.

EQUITY — CLOUD ON TITLE. — A lien or encumbrance, to throw a cloud on title to real property so as to give the owner a right to relief in equity, must be one that is regular and valid on its face, though in fact irregular and void from circumstances which must be proved by extrinsic evidence.

EQUITY — ILLEGAL ASSESSMENT — CLOUD ON TITLE. — Where the illegality of a municipal assessment or tax is apparent on the record of the proceedings, and requires no extrinsic evidence to show it, such assessment or tax is not a cloud upon title, and the remedy of the owner is by action at law, and not by suit in equity.

EQUITY — CLOUD ON TITLE — ILLEGAL MUNICIPAL ASSESSMENT. — Where a city ordinance imposes certain conditions which must be complied with in order to make a local municipal assessment or tax valid, a failure to comply with any one of the conditions renders the tax void; and when such failure appears from the face of the proceedings, no cloud on the title is created, and the remedy of the land-owner is by action at law, and not by suit in equity.

MUNICIPAL CORPORATIONS — ILLEGAL MUNICIPAL TAX — REMEDY OF LAND-OWNER. — An owner of property seized or sold under execution for the

collection of a municipal tax, the illegality of which appears from the face of the proceedings, has an adequate remedy at law, either by paying the tax under protest and bringing an action against the city to recover it back, or by action of trespass to recover damages; or if the property is sold, he may maintain ejectment, or test the validity of the tax by writ of *certiorari*.

MUNICIPAL CORPORATIONS. — PURCHASER UNDER MUNICIPAL TAX SALE, in order to maintain his title, must show that every prerequisite to the power of sale has been complied with, and such compliance must appear on the face of the proceedings.

EQUITY WILL NOT ENTERTAIN JURISDICTION when the only object is to obtain a consolidation of actions or to save the expense of separate actions, or where the claim of right rests on a mere question of law, as for ascertaining the legality of the proceedings of a municipal corporation in levying a tax.

Bradford, for the appellants.

Macallister, for the respondents.

WALES, J. The appellants, who were complainants below, obtained a preliminary injunction restraining the defendant corporation from enforcing the payment of an assessment which had been laid on certain real estate belonging to complainants, on Monroe Street, in the city of Wilmington, for the construction of a public sewer. After a hearing before the chancellor, on bill, answer, and depositions, the bill was dismissed, and thereupon an appeal taken to this court. The transactions which led to the application for an injunction are fully set forth in the bill, but the material charges on which the complainants rely for equitable relief are, that the city's officers and agents acted without lawful authority, both in the construction of the sewer and in the manner and mode of laying the assessment, and that the latter is therefore illegal and void. It is charged that the sewer was made for the purpose of diverting a small watercourse which had previously flowed through a portion of the property now assessed, and not for the purpose of general drainage; that the diversion of the watercourse was the exercise of the right of eminent domain without authority, the city government not being invested with legal power to divert the stream; and that even admitting the possession of the power, the assessment was illegal and void by reason of the neglect or failure of an officer of the city to perform an essential duty in relation thereto, the performance of which duty was necessary to the making of a legal and valid assessment. It appears from the papers on file that the watercourse was not only of no value to any

of the complainants, or to the former owners of the assessed property, but, by reason of its being an outlet for the refuse of factories and slaughter-houses located higher up the stream, was at times a positive nuisance, so that one or more of the complainants, with some sixty residents in the same neighborhood, signed a petition addressed to the city council requesting that a culvert might be constructed to carry off by perfect drainage all the water coming from above, and thus prevent a continuance of what the petitioners represented to be a source of danger to the public health. The fact is not disputed that the petitioners contemplated the construction of the sewer in Monroe Street as being the best and most effectual means of removing the difficulties and annoyances of which they complained. The sewer was made under and along Monroe Street, from a point above to a point below the complainants' land, at a cost of $7,266.35, being at the rate of $9.98 per lineal foot, and the watercourse being turned into it, the nuisance was entirely abated. There was some attempt to show that the city was in fault in causing the nuisance by not keeping that part of the watercourse which was below the complainants' land open and unobstructed, and thus backing up the waters, but the evidence does not sustain this. The surface of some of the complainants' land was depressed below the banks of the stream and the grades of the surrounding streets, making a basin in which, during the heavy rains, the flooded waters would collect and remain until carried off by absorption or evaporation. On the completion of the sewer, a statement of its cost was presented to the city council, which body ordered that one half of the said cost should be paid out of the city treasury, and directed that a portion of the remainder, amounting in all to $1.036.92, should be charged against "the estate of John Montgomery," a former owner of the land now belonging to the complainants, and of which he had died seised and intestate. The property had descended to the children and heirs of John Montgomery, and had continued in their possession as coparceners until a short time before the entry of the assessment upon the lien-book of the city. The description in the lien-book is a general one, being for 257.8 feet on the west side of Monroe Street, between Second and Front streets, and for 157.8 feet on the southeast corner of Second and Monroe streets. The complainants, by claiming ownership of the assessed property, have established its identity, and thus re-

moved any objection to the generality and indefiniteness of its description.

The answer, admitting property in the complainants, and the diversion of the watercourse, claims that the latter was done at the instance and with the knowledge and approval of the complainants; that the sewer was made for general drainage, and that the assessment was regularly and legally imposed. The cost of the sewer was reported to the city council on May 29, 1873, and the matter of the assessment appears to have been considered by that body at several subsequent meetings until September 11, 1873, when it was finally approved and ordered to be entered on the lien-book. In the mean time, in the month of June in the same year, the assessed property was sold at public sale, by an agent duly appointed for that purpose by the heirs of John Montgomery. The land was divided into building lots and sold to sundry purchasers, now the complainants. The agent retained out of the proceeds of the sale a sufficient sum to pay the assessment, in fulfillment of a condition previously announced that the assessment would be paid and the land sold "clear." Part of the money so retained by the agent he afterwards paid over to the heirs, who protested against the validity of the city's claim. One of the purchasers, and a party to the bill, deposed that the value of the property was increased three thousand dollars by the sewer.

An amendment to the charter of Wilmington passed January 30, 1866, confers upon the city council the entire jurisdiction and control of the drainage of the city, with power to pass ordinances for the opening of gutters, drains, and sewers, and for the regulating, maintaining, cleansing, and keeping the same and the natural watercourses, runs, and rivulets within the city limits open, clear, and unobstructed, and for the entry upon private land for such purposes, and by general regulations to prescribe the mode in which the work shall be done, and who shall bear the expense thereof, and in its discretion to assess the costs thereof upon the persons and property real and personal of those particularly benefited thereby, or of those holding lands through or along which said sewers, drains, and watercourses shall flow or pass, and prescribe the mode of collection thereof. The statute provides that private property shall not be taken for public use without just compensation, but is silent as to the mode in which such compensation shall be ascertained. A city ordinance passed June

21, 1866, by virtue of the authority thus given, sets out in detail the manner in which the costs of constructing sewers, etc., shall be assessed. It makes it the duty of the street commissioner to keep an accurate account of the costs of such construction, and, through the street committee, to report the same to the council, together with a list of the persons and estates particularly benefited thereby, as well as of those holding lands through or along which said sewers shall pass, and an estimate of the value of the lands upon which said expense ought to be assessed, the said value to be estimated independently of buildings or improvements. The city council may, or may not, order any part of such expense to be paid out of the general fund, and the whole or remainder, as the case may be, shall be apportioned among those persons and estates particularly benefited, or among those holding lands along which the sewer shall pass. If the owners be unknown, the assessment shall be generally against the lot or premises by particular or general description. The assessment, being approved by council, shall be entered on the lien-book, and may be collected by warrant, under the hand and seal of the mayor.

The bill denies the authority of the city to lay a special tax for the payment of the sewer, and assumes that the expense should be wholly defrayed out of the funds produced by general taxation. But the position most earnestly contended for by the complainants is, that the city having constructed a work partly for an unlawful object, namely, the diversion of a natural watercourse without license from the owners thereof, such unlicensed act of diversion, being outside of its chartered powers, taints the entire work with illegality, and no portion of the expense can be lawfully assessed on the property holders, notwithstanding that another and a lawful end may have been intended at the same time. The doctrine insisted on is, that where a tax or assessment is laid partly for a legal and partly for an illegal purpose, and such tax or assessment is entire and indivisible, the whole tax or assessment is illegal and void. The evidence, however, does not warrant the application of this principle to the present case. The city had the power, under the statute of 1866, to regulate and change the flow or direction of the natural drains and watercourses within its limits, to construct sewers, and to assess the cost upon the owners of property especially benefited. No authority is given to invade or appropriate private property without compensation; this is expressly prohibited. It is true, the

statute does not point out any way of fixing the compensation, but in this instance there is no necessity for ascertaining what might be due for taking for public use a property which was worthless and detrimental to its owners, who asked for its removal as a boon, and have derived profit from its loss. These owners and their privies in estate stood by and saw the preparations made for depriving them of their property without remonstrance or objection. The building and completion of the sewer occupied several months, and its uses and objects were well known. No attempt was made to interfere with the work, nor was the diversion of the watercourse objected to. Some of the complainants requested the city council to carry off by perfect drainage the waters coming from above, and no word of disapproval was heard until the parties benefited were called upon to contribute to the payment of the expense. These facts admit of but one interpretation. The diversion having been made with the consent and approval and to the evident advantage of the property owners, the action of the defendant corporation was not illegal or *ultra vires*. The watercourse had no existing or prospective value for the driving of machinery or for domestic uses, and by its continuance in its old channel rendered the lots through which it flowed unsalable. Its appropriation by the city was more of a public burden than a public benefit, while it afforded a special and advantageous relief to the lot-owners. Such an appropriation, under all circumstances, does not fall within the definition of the exercise of the right of eminent domain. We may therefore dismiss the further consideration of the want of power in the city under the statute of 1866 to make the diversion complained of, and direct our attention to other points presented on behalf of the complainants.

That the expense of local improvements in a town or city may be met by local assessments, in whole or in part, appears to be so well established as to require no discussion: *Stroud* v. *Philadelphia*, 61 Pa. St. 255; 2 Dillon on Municipal Corporations, 596, and notes. But when, under what conditions, and to what extent a court of equity should interfere to prevent the collection of such assessments are questions which have not been uniformly decided. The inconvenience and confusion which might be caused by an indefinite delay in the receipt of municipal or other public revenues, and the serious embarrassments that might follow such delay, are obvious, and courts of equity have therefore been disinclined to put any obstacle

in the way of their prompt collection, except under special circumstances, such as left the complainant without any remedy at law, or where it was clear that the tax had been imposed without authority, and was absolutely void. Even in the latter case, where the only question is one of excess of authority, depending on purely legal principles, it is doubtful whether equity should interpose. Those courts which most closely adhere to the distinctions between legal and equitable jurisdiction have generally refused to interfere by injunction with municipal assessments, except in cases which come under some one of the recognized heads of equity jurisdiction, and the doctrine is universally accepted that the collection of a tax will not be enjoined, except upon the clearest grounds. The most important question, therefore, to be considered is that of jurisdiction; for, although the arguments addressed to us by counsel were chiefly directed to other matters, this question was not waived, but it was expressly contended on the part of the city that the complainants, whatever might be their rights in a court of law, were not entitled to redress in a court of equity.

The complainants insist upon their right to an injunction for the reason that the assessment being illegal and void, a threatened sale thereunder for its collection casts a cloud upon their titles, which they have no adequate legal remedy to remove; that such sale would cause them an irreparable injury; that some of the complainants, having only an equitable title, are absolutely without any remedy at law; and that to refuse the writ would lead to circuity of action and a multiplicity of suits. These are recognized heads of equity jurisdiction, and we are to inquire whether the complainants' case falls under any one of them.

Is this assessment a cloud upon their titles? It is not every irregular or even void assessment that clouds a title. A lien or encumbrance, to throw a shadow upon title to real property so as to give the owner a right to relief in equity, must be one that is regular and valid on its face, but is in fact irregular and void from circumstances which have to be proved by extrinsic evidence. The test is well defined in *Heywood* v. *City of Buffalo*, 14 N. Y. 539, to be where there is an apparent validity in the encumbrance and a total invalidity in fact, which can only be proved by evidence *aliunde*. If the authority under which the assessment was made is unconstitutional, or if the power to tax is conceded, and the officers intrusted

with the duty of fixing the tax rate have exceeded their authority, or if from any other cause, appearing on the face of the proceedings, the tax is irregular and void, it will not affect the title, the defect being visible and undoubted. But a tax may be, from all that appears to the contrary, entirely regular and valid; the authority to levy it may be undisputed; and every preliminary step necessary to be taken by way of notice to the owners of property, and its valuation, the amount of revenue to be raised, and the final apportionment may have been, on the face of the record, in strict compliance with the requirements of the law,—and yet, by reason of fraud, corruption, or neglect on the part of the officers making the assessment, the tax is void.

The record may be false. Notice to owners and valuation of property may not in fact have been made, or the assessing officers may have conspired to make an unjust and partial assessment. An assessment or tax made and levied in the manner supposed, being apparently regular and legal, and in reality arbitrary and corrupt, but requiring extrinsic evidence to establish the fact, casts a cloud upon title. The contention here is, that the statute of 1866 which grants power to the city to regulate or change, within its limits, the course of natural rivulets, to construct sewers, and assess the costs upon the parties specially benefited by the improvement, is unconstitutional, in so far as it undertakes to give the right of taking private property without providing any mode of ascertaining the amount of compensation to be paid to the owner; and that, waiving this objection, and admitting the statute to be valid, certain conditions precedent, prescribed by the city ordinance, and which must be observed in order to make a legal assessment, have not been complied with. It is the duty of the street commissioner, under the ordinance, when he reports to the city council the cost of constructing a sewer, to present at the same time an estimate of the value of the lands upon which said expense ought to be assessed, the value of such lands to be estimated independently of any buildings or improvements thereon. It is charged that the commissioner failed to perform his duty in this respect, and that the records and proceedings of the city council do not show, nor does it appear from any other source, that the required estimate of value was made or presented. The only answer to this is the presumption that official duties have been regularly fulfilled. Without entering into any inquiry as to the effect of this

alleged omission of duty by the commissioner, it is sufficient to know that the omission appears on the face of the proceedings. Conceding, then, all that is claimed by the counsel for the complainants, the assessment is void by reason of its inherent defects. An unconstitutional law confers no authority, and if a city ordinance imposes certain conditions which must be complied with in order to make a legal tax, the failure to comply with any one of the conditions renders the tax void; so that, on the one hand, the city council having acted without authority, and on the other, in violation of its own self-imposed restrictions, the assessment is not binding, creates no lawful lien, and does not cloud the titles of the complainants. But all these matters are wholly within the jurisdiction of a court of law, to be determined by an examination of the statute, an inspection of the journals and records of the city government connected with this particular assessment, and do not call for any outside evidence for the purpose of ascertaining the validity of the tax. Authority in support of this view of what makes a clouded title may be found in the opinion of Chancellor Walworth in *Wiggin* v. *Mayor etc. of New York*, 9 Paige, 23, a case involving the validity of an assessment for the opening of a street. "If the whole proceedings," says the chancellor, "in relation to the opening were absolutely void in law, and that fact appears upon the face of the ordinance itself, a sale for the assessment upon the claimants' lots would not even create a cloud upon his title. For as every person must be presumed to know the law, a proceeding which is upon its face not only illegal, but absolutely void, does not constitute a cloud upon the title to real estate against which a court of equity will relieve." In *Van Doren* v. *Mayor etc. of New York*, 9 Paige, 389, the same eminent judge, reaffirming the principle of the previous case, adds: "A valid legal objection appearing upon the face of the proceedings, through which the adverse party can alone claim any right to the complainants' land, is not in law such a cloud upon the complainants' title as can authorize a court of equity to set aside or stay such proceedings. But where the claim of the adverse party to the land is valid upon the face of the instrument or the proceedings sought to be set aside, as where the defendant has procured and put upon record a deed obtained from the complainant by fraud or upon a usurious consideration, which requires the establishment of extrinsic facts to show the supposed conveyance to be inoperative and void, a

court of equity may interfere and set it aside as a cloud upon the real title to the land." The chancellor cites *Simpson* v. *Lord Howden*, 8 Mylne & C. 97, in which it was decided that there is no jurisdiction in equity to order a legal instrument to be delivered up on the ground of an illegality which appears upon the face of the instrument itself.

In *Pixley* v. *Huggins*, 15 Cal. 127, it was held that if the sale which it was sought to restrain is such that, in an action of ejectment brought by the purchaser under the sale, the real owner would be obliged to offer evidence to defeat a recovery, then such a cloud would be raised as to warrant the interference of equity to prevent the sale. High on Injunctions, sec. 272, recognizes the same rule as settled by the general current of authorities, which draw a distinction between cases where the invalidity or illegality charged as the cloud is shown by evidence *dehors* the record and where it appears upon the face of the proceedings. And while in the former case the relief is freely granted, in the latter, courts of equity will not interfere. To the same effect is *Heywood* v. *City of Buffalo*, 14 N. Y. 539, already cited, approved by *Ewing* v. *St. Louis*, 5 Wall. 413, and by *Dows* v. *Chicago*, 11 Wall. 108. In *Ewing* v. *St. Louis*, 5 Wall. 413, the court says that with the proceedings and determinations of inferior boards or tribunals of special jurisdiction courts of equity will not interfere, unless it should become necessary to prevent a multiplicity of suits or irreparable injury, or unless the proceeding sought to be annulled or corrected is valid upon its face, and the alleged invalidity consists in matters to be established by extrinsic evidence. The most recent case on this point that has come under our notice is *Wells* v. *City of Buffalo*, 80 N. Y. 253, which was an application to set aside an assessment as a cloud upon the title to the plaintiff's land on the ground that the statute authorizing the assessment was unconstitutional, and the court held that no cloud could be created by an assessment which was void upon its face, and dismissed the complaint.

The owner of personal or real property seized or sold under execution for the collection of an illegal municipal tax has an adequate remedy at law, either by paying under protest the amount demanded and bringing an action against the city to recover it back, or by an action of trespass for the recovery of damages. In the case of a sale of real property under a void assessment, as in the case of a sale by the sheriff on a void judgment, the purchaser buys at his peril, and the owner may

fold his arms in defiance, or, if dispossessed, maintain his rights by an action of ejectment. Under such circumstances the owner can sustain no irreparable injury, and would suffer a loss only by his own passive submission to a wrong. A party claiming title under a corporation tax sale must show that every prerequisite to the power of sale has been complied with, and compliance with law must appear on the face of the proceedings: 2 Dillon on Municipal Corporations, 658; *Collector* v. *Day*, 11 Wall. 113.

A writ of *certiorari* will afford the owner of property subject to an illegal assessment another mode of redress or relief. This remedy is expressly referred to as an appropriate one by Mr. Justice Field in delivering the opinion of the court in *Ewing* v. *St. Louis*, 5 Wall. 413, and is approved by Judge Dillon in his excellent work on municipal corporations. That learned author remarks: "The unquestionable weight of authority in this country is, if an appeal be not given, or some specific mode of review provided, that the superior common-law courts will, on *certiorari*, examine the proceedings of municipal corporations, even although there be no statute giving this remedy; and if it be found that they have exceeded their chartered powers, or have not pursued those powers, or have not conformed to the requirements of the charter or law under which they have undertaken to act, such proceedings will be reversed or annulled. An aggrieved party is, in such case, entitled to a *certiorari ex debito justitia*": 2 Dillon on Municipal Corporations, 740.

Equity will interpose, in a proper case, to prevent a multiplicity of suits, excessive litigation, or circuity of action. A court of equity, on a bill being filed for a discovery, will sometimes proceed to take jurisdiction of all the matters in controversy between the parties, instead of sending them to a court of law, and thus avoid circuity of action. And so to prevent a multiplicity of suits, as of one against many, or of many against one, in relation to the same cause of action, the aid of equity may be invoked. But multiplicity does not mean multitude, and equity will not interfere where the object is to obtain a consolidation of actions, or to save the expense of separate actions: *Sheldon* v. *Centre School District*, 25 Conn. 224; *Dodd* v. *City of Hartford*, 25 Conn. 232; *Lord Tenham* v. *Herbert*, 2 Atk. 483; *Eldridge* v. *Hill*, 2 Johns. Ch. 281; or where the claim of right rests on a mere question of law, as for ascertaining the legality of the proceedings of a municipal

corporation: *West* v. *Mayor of New York*, 10 Paige, 539. Chancellor Kent, in *Eldridge* v. *Hill*, 2 Johns. Ch. 281, says: "Enjoining litigation at law seems to have been allowed in only one of these two cases: either where the plaintiff has already established his right at law, or where the persons who controvert it are so numerous as to render an issue under the direction of this court indispensable to embrace all the parties concerned, and to save multiplicity of suits." A distinction is also to be observed between bills for the prevention of multiplicity of suits or bills of peace, whose object is the suppression of useless and vexatious litigation, and cases where the real object of the relief sought is the consolidation of a number of suits of like nature, since in the former class of cases courts of equity may properly enjoin, but in the latter they will refuse to interfere. Thus where an injunction was asked to stay proceedings in ninety-two actions of ejectment, until one or more might be tried, the parties, pleadings, title, and testimony being the same in all the cases, the relief was refused, the real object sought being a consolidation of the actions, which a court of law might properly grant: High on Injunctions, 329; *Peters* v. *Prevost*, 1 Paine, 64. In *Pennsylvania Coal Co.* v. *Delaware & H. Canal Co.*, 31 N. Y. 91, it was said that where a right can only be adequately protected or enforced by ruinous or expensive lawsuits, courts of equity have interposed their jurisdiction, and have given the party redress by injunction, specific performance, or other adequate relief, in order thereby to prevent litigation and the mischief which results from it. Bills of peace, says another authority, have been sustained by the court to settle the rights of parties in a single suit, in cases where the questions to be determined were questions of fact, or mixed questions of law and fact. But no such bill can be sustained to restrain a defendant from suing at law, where the rights of the parties depend upon a question of law merely, and where the defendant in a suit at law must eventually succeed in his defense, without the aid of a court of chancery, if the law is in his favor: *West* v. *Mayor of New York*, 10 Paige, 539. The real object sought to be reached by the complainants being a consolidation of their actions or remedies against the defendant corporation, they have not presented such a case on the facts and the law as would warrant a court of equity in taking cognizance of their controversy to the exclusion of a common-law court which has all the necessary jurisdiction and power to

grant them full and adequate redress. It would be an evasion of principle to allow a dozen or twenty property owners to tie up the hands of a tax collector, while the individual owner was compelled to seek his remedy in a court of law. A combination of taxables could at any time arrest the operations of a municipal government by enjoining the collection of taxes, and thus subordinate public to private interests.

The charge that some of the complainants, being only equitable owners of a portion of the real estate subject to the lien of the assessment, are absolutely remediless at law would furnish a strong reason for interference if they were not represented by a trustee duly appointed, who has accepted the trust, is acting in that capacity, and has signed the bill of complaint. Holding the legal title to the land, he is in all respects competent to protect the rights and interests of his *cestuis que trust* in a court of law.

The application for an injunction being unsupported by the facts and the settled principles and practice of equity as we understand them, we think the bill was properly dismissed by the chancellor. In coming to this conclusion we have purposely abstained from expressing any opinion on the sufficiency of the main objections to the assessment. The appropriate tribunal for their settlement is the superior court, by which they can be heard and determined without interrupting for a single hour the collection of the public taxes, and without impairing the rights or injuring the property of the complainants.

MUNICIPAL CORPORATIONS. — DISTINCTION BETWEEN RIGHT OF TAXATION AND EMINENT DOMAIN: See extended note to *People* v. *Mayor*, 55 Am. Dec. 267.

POWER TO TAX AND LEVY ASSESSMENTS MAY BE DELEGATED TO MUNICIPAL CORPORATIONS: *Mayor of Baltimore* v. *State*, 15 Md. 376; 74 Am. Dec. 572, and extended note; *Mayor of Baltimore* v. *Keyser*, 72 Md. 106; *Ulman* v. *Mayor*, 72 Md. 587; *State ex rel.* v. *Mayor*, 71 Wis. 502; *Adams* v. *Bay City*, 78 Mich. 211.

INJUNCTION, WHEN WILL LIE TO ENJOIN THE COLLECTION OF TAXES OR ASSESSMENTS. — Equity will not, in general, interfere to enjoin the collection of taxes and assessments; some special reason must be shown before it will interfere: Note to *Holland* v. *Mayor*, 69 Am. Dec. 195; *Wilson* v. *Auburn*, 27 Neb. 435; *Emerson* v. *Township*, 63 Mich. 483; *Union Iron Works* v. *Bassick etc. Co.*, 10 Col. 24. Equity may restrain the collection of a tax where there was no power to levy it: *Ottawa* v. *Walker*, 21 Ill. 605; 71 Am. Dec. 121. A tax-payer may test, by injunction, the validity of an assessment: *Page* v. *Allen*, 58 Pa. St. 338; 98 Am. Dec. 272. Equity will restrain an illegal assessment: *Teall* v. *City of Syracuse*, 120 N. Y. 184.

INJUNCTION WILL LIE TO PREVENT A CLOUD ON TITLE: See note to *Holland* v. *Mayor*, 69 Am. Dec. 205.

INTERFERENCE OF EQUITY TO PREVENT MULTIPLICITY OF SUITS: See extended note to *Fellows* v. *Fellows*, 15 Am. Dec. 427. The general rule seems to be, that several grievances must be redressed by several suits, the exceptions to this rule being where a single right is asserted on one side which affects the parties on the other side in the same way, or a single wrong is complained of which falls on them all simultaneously and together: *Winslow* v. *Jenness*, 64 Mich. 84. Between different parties, equity will not prevent a multiplicity of suits, though the issue is the same in each case: *Dyer* v. *School District*, 61 Vt. 96.

EVANS *v.* LOBDALE.

[6 HOUSTON, 212.]

HUSBAND AND WIFE — JUDGMENT LIEN AGAINST HUSBAND — EFFECT OF JOINT CONVEYANCE. — When husband and wife, by joint deed of bargain and sale, convey in fee-simple, and for full value, lands devised to her, the right of the husband to take as tenant by the curtesy is extinguished, and the purchaser takes the land free of any existing judgment liens against the husband.

S. ALLEN died June 8, 1873, and by his will devised to Laura Evans, the wife of E. B. Evans, the property in dispute. By deed dated March 1, 1879, Evans and wife, having issue living and capable of inheriting her estate, conveyed their interest in said property to W. W. Lobdale, for full value. Lobdale, upon the delivery of said joint deed, refused to pay the purchase-money, on the ground that a certain judgment against said Evans, rendered in November, 1875, was a lien on the inchoate right of curtesy of said Evans in said property.

Lore, for the plaintiff.

V. Du Pont, for the defendant.

WALES, J. The question reserved for decision is, Has the husband any estate or interest in his wife's land which is bound by the judgment?

The contention of the plaintiff is, — 1. That the several acts of assembly for the benefit of married women were enacted for the purpose of exempting her property from liability for the debts or contracts of her husband; 2. That, being remedial statutes, they should be so construed as to advance the remedy and effect the purpose of the law; and 3. That the statutes abolish the husband's freehold interest in his wife's real estate, *jure uxoris*, also the tenancy by the curtesy initiate, and leave only a possibility contingent on the husband

surviving his wife, which possibility is not subject to execution.

Before the passage of these several acts for the benefit and protection of married women, and which, taken together, may be considered as one statute, the real estate of the wife was subject to the control of her husband and liable for his debts, according to the common law then in force in this state. If, upon her marriage, or at any time during coverture, she was seised of an estate of inheritance in land, her husband became seised of the freehold *jure uxoris*, and he took the rents and profits during their joint lives. This was an estate in him for the life of the wife only, unless he was also tenant by the curtesy. It was an estate in him for his own life if he died before his wife, and in that event she took the estate again in her own right. If the wife died before the husband, without having had issue, her heirs immediately succeeded to the estate. If there had been a child of the marriage born alive, the husband took the estate absolutely for life as tenant by the curtesy, and on his death the estate went to the wife or her heirs. The husband, therefore, might become successively possessed of three several interests in his wife's lands: 1. A freehold interest by right of the wife; 2. Tenancy by the curtesy initiate on the birth of a child; and 3. Tenancy by the curtesy consummate if he survived the wife, having had issue: 2 Kent's Com. 130; 2 Bla. Com. 128.

The rights of the husband could be assigned by him to a purchaser, were liable for his debts, and could be seized and sold on execution by his creditors, and were therefore subject to the lien of any judgment that might be recovered against him. Has the statute for the benefit of married women abolished this lien? We answer this question in the affirmative. The first section of the act of 1873 as amended by the act of 1875 provides "that the real and personal property of any married woman which has been heretofore acquired, is now held, or which she may hereafter acquire in any manner whatsoever from any person other than her husband shall be her sole and separate property, and the rents, issues, and profits thereof shall not be subject to the disposal of her husband, nor liable for his debts." The fourth section gives to the wife the right to dispose of her property, both real and personal, by will; "but such disposal shall not affect the rights of the husband as tenant by the curtesy; and if she die intestate, her property, both real and personal, shall descend to

her heirs as now provided by law": Am. Stats. 479; 15 Del. Laws, 289. The intent of the statute is clearly expressed, and is too plain to be misunderstood. It was to release the wife's property from the control of her husband during her life, and to exempt it from all liability for his debts. This intent would fail if a judgment against the husband was held to be a lien on his possible interest in his wife's land so as to prevent its alienation by them no matter what advantages might be derived from a sale.

Under the operation of the statute, the rents and profits of her land are no longer subject to her husband's disposal, as formerly, nor liable for his debts. It was designed to abolish both his freehold *jure uxoris*, and the tenancy by the curtesy initiate, leaving him only the tenancy by the curtesy consummate in the event of his surviving his wife and having had issue by her during the marriage. This contingent right may now, by force of the statute, be extinguished by the joint conveyance of the husband and wife to a purchaser, as in the present case, and the grantee would take a title free of all liens and encumbrances against the husband. He no longer has any interest or estate in his wife's lands during her life; she holds them as "her sole and separate property," and when the husband and wife join in executing a conveyance of them, they are conveyed as she held them, free from any estate or interest of her husband. At common law the tenancy by the curtesy vested on the birth of issue, and the husband began to have a permanent interest in the lands: 2 Bla. Com. 127; but the statute has abrogated this vested right, and there is now no marital right in the wife's real estate while she is alive on which a judgment against the husband can fasten; and when he unites with the wife in making a deed of bargain and sale of her lands, he concludes himself by way of estoppel from claiming any interest or estates in them after her death: 4 Kent's Com. 261, notes; *Potts* v. *Dowdall*, 3 Houst. 369.

Chancellor Zabriskie, in giving a construction to a statute of New Jersey in its general features like the one under consideration says: "The act, though inconsistent with the estate of curtesy initiate, does not defeat the husband's curtesy at the death of the wife. The act only protects her estate during life; it does not at her death affect the law of succession as to real and personal estate": *Porch* v. *Fries*, 18 N. J. Eq. 205.

HOUSTON, J. Concurring in the conclusion just announced in this case, I will take occasion to add that, in my opinion, such must have been the decision of the court on the question presented if it had arisen prior to the passage of the statutes referred to of 1873 and 1875, and while the principles and doctrine of the common law were yet in full force and effect on the subject in this state. So far as I have had time to examine the authorities at common law upon it, I do not find that this particular case, or any one presenting this precise question, has ever before arisen in England or in this country, although similar sales by husband and wife of real estate belonging to the wife in which he had at the time an initiate estate as tenant by the curtesy at common law must have often been made in times past in both countries. But in regard to the essential and indispensable requisite of the seisin in fact, either actual or constructive, of the wife in the estate of inheritance in question, I find it has been ruled at common law that if the husband, after the birth of issue capable of inheriting the wife's estate in the premises, makes a feoffment in fee of them to another, and the wife dies, the feoffee shall hold them during the life of the husband, and the heir of the wife shall not, during his life, avoid it by *sur cui in vita*, because it could not be a forfeiture, for the reason that his estate of tenant by the curtesy was but initiate, and not consummate; and now, since 32 Henry VIII., chapter 28, the issue shall not enter in such case till after the husband's death, which shows that in this feoffment his interest and title to be tenant by the curtesy are involved, and pass by it to the feoffee, though not to such purpose as to make him tenant by the curtesy, which none but the husband, in any case, can be.

For the same reason, it seems that after issue born, he may lease the land for his own life: 3 Bac. Abr. 17, tit. Curtesy of England, E. Baron and *feme* have issue, and after join in suffering a common recovery; the *feme* was within age, and appeared by attorney; yet after her death, it seems, the heir could not assign this for error till after the husband's death: 3 Bac. Abr. 17, tit. Curtesy of England, E. But baron and *feme*, seised of lands in right of the *feme* (whereof the husband was entitled to be tenant by the curtesy in case he survived her), levied a fine, which was afterwards reversed as to both for the nonage of the *feme*, the husband shall have it again as tenant by the curtesy, because the fine levied was utterly avoided by the reversal of it: 3 Bac. Abr. 19, tit.

Curtesy of England, F; *Charnock* v. *Worsely*, Cro. Eliz. 129; *King and Parker* v. *Weba and Wife*, Cro. Jac. 482. If the husband, after issue born, makes a feoffment of the wife's lands, the feoffee shall hold during the life of the husband, for his feoffment was not a forfeiture: Co. Lit. 30 a; Com. Dig., tit. Estate, D, 1. But by the feoffment his title to be tenant by the curtesy was extinguished; and therefore if the feoffment was upon condition, and he enters for the condition broken, he shall not afterwards be tenant by the curtesy: Co. Lit. 30 b; Com. Dig., tit. Estates, D, 1. Tenancy by the curtesy initiate is a vested interest, grantable by feoffment: *Pemberton* v. *Hicks*, 3 Dall. 482; Co. Lit. 30 a, 29 b, 31 a, 67 a.

Now, if such were the principles of the common law in relation to the estate and title of a tenant by the curtesy initiate, nearly at the time of Lord Coke, why should not the joint and voluntary conveyance of the husband and wife in this case by deed of bargain and sale in fee-simple, for its full value in money, to the purchaser, Lobdale, the defendant, of all the right, title, and estate of each of them in the lands and tenements in question, be held at common law, and independent of our recent statutes in relation to the rights of married women, to extinguish and annul all the right, title, and estate of the husband in them, either now or hereafter, in case he should survive the wife, as tenant by the curtesy? And by their joint act and deed, not only has the husband sold and conveyed to the purchaser all his vested interest and estate in the premises for the price and consideration agreed on between them, but the wife has also voluntarily done the same with all her right, title, and estate in them in immediate and absolute fee to the defendant, and has thereby completely parted with her seisin, both in law and in fact, in the premises, and with all claim to it now or hereafter, unless she should repurchase or become repossessed of them hereafter and during the lifetime of the husband; in which event, should she afterwards die and the husband survive her, remote and improbable as these contingencies must be, it is difficult to perceive how the defendant could even then possibly be prejudiced by the lien of the judgment in question against the husband and his estate as tenant by the curtesy in that case in the premises.

HUSBAND AND WIFE. — A wife will be protected from judgment liens against her husband: *Van Duzer* v. *Van Duzer*, 6 Paige, 366; 31 Am. Dec.

257, and note; *Sale* v. *Saunders*, 24 Miss. 24; 57 Am. Dec. 157, and note.

A married woman's real estate is exempt from her husband's debts: *Howard* v. *Tenney*, 87 Ky. 52; *Compton* v. *Patterson*, 28 S. C. 152; *Hoag* v. *Martin*, 80 Iowa, 714; *Long* v. *Efurd*, 86 Ala. 267.

BURTON *v.* WILLIN

[6 HOUSTON, 522.]

SET-OFF NOT ENFORCEABLE AT LAW MAY BE ALLOWED IN EQUITY. — A just account for necessaries furnished a minor for maintenance and education by the executor of her father cannot be pleaded in payment or as a set-off in a court of law to a *scire facias* to recover her portion of a recognizance entered into by the executor in the orphans' court. Such account, however, when established may be allowed as a set-off thereto in a court of equity.

PAYMENT. — NOTHING IS PLEADABLE AS PAYMENT except money, or something agreed to be accepted in lieu thereof, and no subject of set-off can be treated as in any sense payment.

SET-OFF IS NOT A GOOD PLEA AT LAW TO SCIRE FACIAS upon a recognizance in the orphans' court or elsewhere.

SET-OFF IS GOOD DEFENSE TO ACTION OF DEBT on a recognizance in the orphans' court.

SET-OFF IS NOT GOOD DEFENSE TO SCIRE FACIAS on a recognizance in the orphans' court in an action at law, but it may be pleaded in a court of equity, where the technicalities and forms of the common law do not prevail.

SET-OFF NOT PLEADABLE AT LAW, WHEN WILL BE ALLOWED IN EQUITY. — When a party has a just defense by way of set-off, but is prevented by technicality or mere form from setting it up at law, equity will arrest the career of the plaintiff at law until he allows the set-off.

ASSIGNMENT OF RECOGNIZANCE. — A party entitled to a share or the whole of a recognizance cannot assign it so as to defeat any legal or equitable defense to which it was subject in the hands of the assignor.

INFANCY — RIGHT TO RECOVER FOR NECESSARIES. — A person who furnishes a minor who has no guardian with actual necessaries is entitled to recover therefor.

BENJAMIN BURTON, the complainant, was the eldest son and heir at law of his deceased mother, and, as such, had accepted in the orphans' court, on September 20, 1855, a certain allotment of her real estate in partition proceedings by her heirs at law, and had entered into a recognizance to pay $2,430.73, with interest, one year thereafter to the parties entitled to it. The share of David Burton, a brother of the complainant, then amounted to $773.41. These brothers were then and continued to be partners to the time of the death of David. David Burton died insolvent, leaving a child named Virginia,

about five years of age, whom Benjamin Burton maintained and supported, as the executor of her father, until she married one Truitt, on August 9, 1870. The amount due on the recognizance to D. Burton remained unpaid at the time of his death, and when Virginia attained the age of twenty-one years, and after her marriage to Truitt, an amicable action was entered into on August 9, 1871, by all parties concerned, for the purpose of ascertaining the amount due from B. Burton, and to settle his account as executor of the estate of D. Burton. This question being submitted to referees, they reported that nothing was due Virginia Truitt on the recognizance, and on the contrary, the sum of $143.11 due B. Burton from the estate of D. Burton. On April 21, 1871, said Truitt assigned the recognizance to G. W. Willin, and in December of that year Truitt and his wife removed to Maryland to reside. Soon after the assignment, Willin sued out a *scire facias* to collect the amount due Truitt and wife in her right upon the recognizance, and the complainant, B. Burton, in this suit petitioned for an injunction, which was granted and afterwards dissolved, and a decree entered against complainant, who appeals.

Jacob Moore, for the appellant.

C. M. Cullen and Bayard, for the respondents.

COMEGYS, C. J. The chief question in this case, as shown by the arguments of the solicitors on both sides, is this: Is the account of the complainant, for necessaries supplied Virginia C. Truitt during her minority, a proper subject of set-off in this court against the suit in the superior court of Sussex County of the respondent upon the recognizance of the complainant in the orphans' court of said county, entered into by him as assignee of one of the tracts of land of his intestate mother, Polly Vessels? Payment it is not; for nothing is to be considered as such, and to be allowable under the plea of payment, but money, or some valuable thing agreed by the creditor and debtor to be accepted as payment. In this case, then, the complainant's claim is a proper subject of set-off here, or this court will take no cognizance of it.

And here it is proper to observe that no objection was made in the several arguments before us that the account of the complainant was not for actual necessities for the respondent Virginia C. Truitt during her minority; in fact, it seemed to be conceded that the account itself was not wrong. It would have been difficult to contend to the contrary, in view of the

testimony of Mr. Charles M. Cullen as to what the respondent Truitt told him his wife had said in respect to the whole of it except a few small items; of that of Daniel Burton as to what was said about it at the interview between the complainant and Truitt and wife, at the house of John P. Burton, on the —— of November, 1870; and the nature of the testimony of Mrs. Sophia Burton in relation to the same subject. There was evidently no dispute about the account, generally, at the interview, nor any disposition afterwards to gainsay it. It was treated as a correct account, except a few small items, and all the items have been proved but those representing articles furnished by the complainant's wife, amounting to about fifty dollars. The admissions and proofs together establish the account, except as just mentioned, and thus it was, no doubt, that objection was not made in the argument to the account as such. We may therefore treat the claim of the complainant, minus the articles supplied by his wife, and not proved, as right in itself.

Notwithstanding this, it is insisted, and the force of the argument of the counsel for the respondents seems to be directed chiefly to that point, that there is no ground for relief in equity, because adequate remedy could have been had at law by plea of payment to the *scire facias* for Willin's use (if Willin were affected by the complainant's claim), or by plea of set-off and proof under it. It is true, this defense is not made in the answers or by plea, and, strictly, it was too late to insist upon it in the argument; but assuming that it was not, there is obvious answer to it. I have already stated that nothing is pleadable as payment but money, or something agreed to be accepted in lieu of it. This is all that can be shown under such a plea. No subject of set-off can be treated as in any sense payment, else the statutes of set-off were unnecessary; and this is an answer to the suggestion in one of the authorities cited, and upon which much was rested in this case, — that set-off is a form of payment. So much for position. With respect to the other, it is sufficient to say that set-off is not a good plea to a *scire facias* upon a recognizance in the orphans' court or elsewhere. If the action of debt were brought on a recognizance like this, set-off might be a proper defense, as in any other action of debt, and no objection could be made that the debts were not due in the same right; for although a suit on the recognizance would be in the name of the state for the use, etc., yet the interest of the *cestui*

que use is a creature of law, and is therefore a legal claim. But to a *scire facias* on a recognizance in the orphans' court the plea is no more proper than to a *scire facias* on a judgment, where, prior to the statute of 4 Anne, chapter 16, section 12 (which is in force in this state), even payment could not be pleaded. The statute of set-off does not apply to cases commenced by *scire facias*. *Nul tiel* record, payment (since the statute of Anne), and release are good pleas, but not set-off, which applies to cases where the debt yet remains to be proved and judgment recovered. Where judgment has already been recovered, as in the ordinary cases, by confession, by virtue of warranty, of attorney, or otherwise, or by suits on open claims, or where a recognizance for the benefit of individuals (as recognizances in the orphans' court) has been entered into, set-off cannot be pleaded at law, by reason of the very nature of the proceeding, which is to have execution; but relief must be had in a court of equity, where the technicalities and forms of the common law do not obtain. The writ of *scire facias*, though in a certain sense an action, because it may be pleaded to, yet is not the kind of action meant in the statutes of set-off in England or in this state. The mutual debts "due at the time of action brought" are not debts arising after judgment recovered on recognizance entered into. No one, surely, would contend that set-off would be a good plea to a *scire facias* on an orphans' court recognizance. Relief must therefore be had in a court of equity to get the benefit of deduction of a counterclaim. Judgment should have been recovered on it before judgment on the *scire facias*. In that event, the plaintiff in the former might apply to the equity side of the court, where judgment was afterwards rendered on the *scire facias*, to set one off against the other: *Morris* v. *Hollis*, 2 Harr. (Del.) 4.

Having determined that the claim of the complainant was not an available defense at law as payment, and could not be set off in the suit upon the recognizance, the question is, Can the court of chancery give him relief by way of set-off, or allowance of such claim, against the suit on the *scire facias*?

The chancellor *ad litem*, in the reasons for his decree dissolving the injunction, while not controverting the fact that the account of the complainant was for what in law are necessaries, yet seems to think that, supposing he had relief in his court because of want of power to give it elsewhere, yet before he could claim it he should have established his ac-

count by a judgment at law. This would unquestionably be a sound view of the case, if there were in fact any serious dispute about the account; but I have pointed out, by referring to the testimony of Messrs. Cullen and Burton, and by that of Mrs. Burton, that there was no ground for any; and so the respondent's counsel evidently thought, for they made no point in this court that the account was not just, and did not contend that any charges were unproved, except those aggregating about fifty dollars for articles supplied by the respondent's wife. Leaving them out, there is more than enough left to counterbalance the claim under the recognizance at the time it was assigned to the respondent Willin. There was no necessity, therefore, to establish the account at law. And the facts of this case show that whatever admissions of the correctness of the account were made by the respondents Truitt and wife were not drawn from them in undue haste, or by any misrepresentation or concealment. Mrs. Truitt was married on the 9th of August, 1870, and came of age on the following 19th of the same month. Not till about three months afterwards did the complainant make any move whatever to have a settlement of his account, and then it was with the husband as well as the wife, and at the house of her aunt, who was no relative of him, but is a witness against him. In the mean time, there was ample opportunity, if Truitt had availed himself of it, to inquire into the condition of the estate of his wife's father, and the propriety and correctness of the charges for the necessaries supplied his wife. It would seem, therefore, that there was no attempt on the part of the complainant to entrap the respondents Truitt and wife into a settlement before they had time to look about them and prepare for it. In fact, the point is not made directly in the pleadings, evidence, or arguments that the respondents were deceived by the complainant, but the most imputed is, that he, knowing all about the estate, ought to have informed them of it before he undertook to get them to agree to his account, and that it should be set off against or deducted from the recognizance. But this is insisted on simply as a reason why they should not be bound by an agreement to allow and deduct, and not that their admission of the correctness of the account, so far as it went, should not be held binding. The point insisted on seems to be, that he should have paid himself out of the assets of his brother's estate, he being executor of it, and not be permitted to deduct

it from the recognizance. This calls forth an important fact admitted in the argument here, and sustained by the list of exhibits filed by the complainant in the court below, that in an amicable action between Truitt and wife and the complainant in the superior court of Sussex County, entered on the 9th of August, 1871, there was a reference of everything connected with the settlement by the complainant of the estate of his deceased brother, the father of Mrs. Truitt, the partnership affairs of the firm or partnership between the brothers being taken into consideration by consent, by three of the best qualified men in the county, of large experience and excellent judgment, who found that the estate was indebted to the complainant in the sum of $924.75 for overpayment by him beyond all the assets that came to his hands, including the proceeds of the sale of the real estate of his said brother, and in the further sum of $143.11, for commissions (not before allowed him) on a testamentary account of the estate of said deceased. Their report was made to the April term, 1874, of said superior court. If the estate of the deceased brother was a debtor to the complainant for payment of debts, etc., against it to the amount found by the referees (and the fact is not denied), and he was also entitled to the said sum of $143.11, then there was nothing out of which he could reimburse himself for the necessaries supplied his niece. Unless, therefore, he can have relief by way of set-off, or otherwise, against his recognizance now in the hands of the respondent Willin, he will be without any means of repayment, the respondents Truitt and wife residing out of the state, and having no property here.

It was a point made in the argument in this court, and much stress was laid upon that view in the chancellor's opinion, that the claim of the complainant is not such an equity as will justify the court of chancery in treating it as a set-off to the recognizance, and the opinion of Judge Story, sitting in the circuit court of the United States for the first circuit, in the case of *Grim* v. *Darling*, 5 Mason, 201, is cited in support of that view. According to that distinguished judge, to warrant a set-off, there must be mutual credits as well as debts; that is, there must not only be indebtedness one to the other, but some sort of understanding between the parties that one claim shall be deducted from the other; in other words, each gives credit to the other, because of his indebtedness to that other. This seems to restrict the privilege of set-off within

very narrow limits; and if it could be made to apply to this particular case, it would place the complainant in a very unfortunate situation; for the pecuniary condition of the respondent Truitt was such, at the time of the assignment to Willin, that there was no prospect of getting anything out of him by execution. We have the testimony of Mr. Cullen that the respondent Willin, in a conversation with him on the day he took the assignment from Truitt, told him that he was about to take it, and that he could "secure his debt in that way." From this language the inference seems warranted that it was the only way in which he could do it, and it certainly is a fact in the case that at that time Truitt was under execution, and there were suits pending against him. It was very prudent so far, then, for Willin to take the assignment. Now, if the complainant could not be allowed his set-off or deduction from the recognizance, he would be without any available remedy whatever. But if it should be recognized as law in this state that to make set-off valid there should be some understanding of mutual credit, or, as Judge Story calls it, "stoppage *pro tanto*," it is very plain none could have been had in this case; for the respondent Virginia Truitt was a minor during the whole time up to her intermarriage, and could make no agreement nor have any understanding whatever with the complainant about credit or stoppage. She could bind herself for necessaries, but not further. Her power was the naked one of incurring liability for them, but nothing beyond. Clearly, then, the complainant will be utterly without relief, unless he can get it in equity by way of set-off. But independent of this view, which is, however, sufficient, our statute of set-off only speaks of mutual debts, omitting entirely the word "credits," which was of so much importance, in the view of Lord Mansfield, in the case of *French* v. *Fenn*, 3 Doug. 257, a bankruptcy case, where the set-off was allowed against the assignee. Here there were mutual debts; that is, the complainant owed the wife of the assignor her share of his recognizance, and she owed him for necessaries furnished her during her minority. He had no power to set off the debt he owed her, because a *scire facias* was issued to collect it by the assignee; nor could he plead it as payment, because, as I have shown, payment it was not; and there was in fact no plea under which he could avail himself of it. His claim not growing out of hers, but being entirely independent of it, set-off is the only way of deducting it from it, and as

that cannot be done at law in a *scire facias* on the recognizance, it must be a subject of equitable relief, like other rights, remediless at law. That it would be a proper subject of set-off against a claim under a recognizance is shown by the case of *State, use of Cannon*, v. *Cannon*, 1 Harr. (Del.) 324, where, in a suit against a surety to recover a distributive balance of an intestate estate, the superior court in this state allowed proof to be made of necessaries furnished the plaintiff in his minority by his mother, who was the administratrix. This case establishes that where a minor is supplied with necessaries they may be deducted, even by a surety of the administratrix who supplied them, from the amount claimed in debt on her bond for a distributive balance; from which it follows that if the suit had been against her, instead of her surety, a set-off might have been pleaded, mutuality existing and the action being debt. In this case, then, it is the form of proceeding — *scire facias*, and not debt — that would prevent the complainant from pleading his set-off, though it exists all the same. Now, it is the plainest law that where a party has a just defense to a suit, but is prevented or obstructed by some technicality or mere form from setting it up, a court of equity, which is no respecter of forms, and does not notice technicalities, will arrest the career of the plaintiff at law till he allows the set-off, if it be of that nature, and altogether if it exceed his cause of action.

But it is contended that were it true that if Truitt and wife had proceeded on the recognizance, the complainant might set off in equity his account for necessaries against their claim, yet here is the case of a *bona fide* assignee, and such course cannot be taken with respect to him. Two grounds are taken for this view: 1. That there is no equity here, because the complainant's claim is an independent one, and does not grow out of the transaction of the recognizance; 2. That Willin is not, upon the evidence, to be charged with notice of the equity, if such existed. With respect to the first ground, we have to observe that there being no relief at law for the complainant against this claim because of technicality, his right of set-off, which can only be enforced in equity, would be entirely defeated if such view should prevail. The equity of set-off, valid at law, but unenforceable for want of right to plead it in the *scire facias*, would be denied him, although the statutes of set-off are as operative in a court of equity as at law, where the former finds occasion to exercise its power

with respect to them. Here, then, is an all-sufficient equity existing between the original parties, and the assignee of the right of the meritorious party is affected by it.

As to the second ground, it is sufficient to say that there is no law of this state that clothes the party entitled to a share or the whole of a recognizance with the right to assign it away, so as to defeat any legal or equitable defense against it to which the recognizer is entitled. Such a chose stands in no sense upon the same footing as maturing commercial paper, but the assignee takes it subject to all equities and defenses to which it was subject in the hands of the assignor. In other words, he takes it the same as the assignor held it, and for no better title or interest; and it being non-assignable, legally speaking, the duty devolves upon him to inquire of the recognizor, like the assignee of a bond of the obligor, if he wishes to be certain of what he is buying, whether there are existing any claims of payment, or offset, or if there is any other defense against it. In the case of *Robinson* v. *Jefferson's Adm'r*, 1 Del. Ch. 245, before Chancellor Ridgely, in Sussex, in 1823, he said, speaking of certain single bills which were the subject of the suit before him: "It should be remarked that these bills are not assigned according to the form of the act of assembly. The assignments are therefore equitable only; and the bills are liable in the hands of the assignee to all the equities to which they are liable in the hands of the obligee. But even if they had been assigned according to the act of assembly, the assignee would have taken them subject to the same objections which might have been made against them by the obligor in the hands of the obligee. This is the well-known and established law, and the assignee, before he takes the assignment of a specialty, ought to inquire whether it be liable to any plea, discount, or impeachment whatever." Decree affirmed on appeal, June term, 1827.

With respect to what was said in the argument about the complainant not having been appointed guardian of his niece, it is sufficient to remark that he was under no legal obligation to take upon himself that office. If he had taken it, however, the well-known and enlightened liberality of the orphans' court in this state is assurance that in the case of a ward like Virginia C. Burton, belonging to a family of high respectability in the county of Sussex, and being designed, as was said, for a teacher, the judges of that court in that county would have allowed the guardian to expend for her

support and education all that was necessary for that purpose, and to quite the extent that was done by the complainant.

In case where a minor has no guardian, and some one supplies necessaries, the question between them would be, Were the articles sold and delivered, board furnished, education provided, medical attendance supplied, necessary for one in the circumstances of the minor as to rank in life, fortune, etc.? If they were, the fact that they exceeded the minor's income received by the party supplying them would be of but little moment. Though a legal guardian may not exceed income without authority of the orphans' court, — there being a tribunal to which he can apply for such power, and which can grant it, and the statute prohibiting him from so doing without resorting to it, — yet, where there is no guardian, a person, *quasi* such, may do it in the minor's interest, running the risk of the verdict of a jury, under instruction of the court what necessaries are, that his supplies were not necessaries in law, and were excessive in quantity and expensiveness.

It is therefore ordered, adjudged, and decreed that the decree of the chancellor *ad litem* be reversed; that the injunction granted in the case below be made perpetual; and that the respondents pay the costs in this court and in the court below in three months, or that attachment issue.

SET-OFF. — For a full discussion of the subject of set-off, see note to *Gregg* v. *James*, 12 Am. Dec. 151; note to *Stewart* v. *Coulter*, 14 Am. Dec. 680.

WHAT CONSTITUTES AN EQUITABLE SET-OFF: See *Bunting* v. *Ricks*, 2 Dev. & B. Eq. 130; 32 Am. Dec. 699; *Pearson* v. *Keeley*, 6 B. Mon. 128; 43 Am. Dec. 160; *Smith* v. *Washington*, 31 Md. 12; 100 Am. Dec. 42. Unless a lien exists, equity will not enlarge the right of set-off at law: *Abbott* v. *Foote*, 146 Mass. 333; 4 Am. St. Rep. 314.

CASES

IN THE

SUPREME COURT

OF

COLORADO.

ROSEVILLE ALTA MINING COMPANY *v.* IOWA GULCH MINING COMPANY.

[15 COLORADO, 29.]

FIXTURES. — ENGINE, WITH ITS BOILER AND ATTACHMENTS, placed upon and securely attached to the public lands of the United States by the locator and occupier of a mining claim thereon, for the purpose of operating such claim, constitutes a part of the realty, and therefore is not liable to seizure and sale under execution as personalty.

FIXTURES — MACHINERY — RULE FOR DETERMINING. — The intention of the owner in attaching machinery to land must be considered in deciding whether or not it becomes a fixture; and if it appears that he attached the machinery with a view to its remaining permanently, it must be treated as real estate. His intention is to be inferred from the nature of the article affixed, the relation and situation of the party making the annexation, the structure and mode of annexing, and the purpose for which the annexation has been made.

J. W. Easton and H. P. Krell, for the appellant.

J. A. Ewing, for the appellee.

RICHMOND, C. This was an action of replevin brought to recover the possession and damages for the detention of one fifteen-horse-power engine and boiler, including smoke-stack, rope, and hoists; also one pair bellows, one truck, and three buckets. The defense was, that the articles above enumerated were personal property subject to execution, and were levied upon by virtue of an execution issued in a certain cause wherein the plaintiff herein, the Iowa Gulch Mining Company, was defendant, and one William H. Eaker and N. N. Robertson were plaintiffs. The validity of the judgment and

subsequent proceedings are not questioned. The only point in issue in this court is, whether the engine and boiler mentioned were fixtures and a part of the realty, and therefore not liable to seizure and sale under an execution as personalty. The cause was tried by the court, and it was found that the engine and boiler were so attached to the land as to become chattels real, and not subject to levy under the execution as personal property; that appellee was entitled to their possession; that they were of the value of $1,000; and that plaintiff had sustained damage by the loss of their use in the sum of $475. Upon these findings, judgment was rendered in the usual form.

The facts as they appear are, that the appellee, the Iowa Gulch Mining Company, was in the occupation of a certain mining claim known as the "Scooper Lode," in the California mining district, Lake County, Colorado. All of the articles levied upon were used by the company in and about the development and mining of the said claim. On the claim was constructed an engine-house, shaft-house, or shed. Within the engine-house was erected the engine, placed upon three sets of timbers laid crosswise and lengthwise, sunk in the ground, and earth tamped around them, and on these was placed a frame that the engine stood on, which was bolted down to the timbers. The boiler was set about three feet from the engine, on rock-work, and connected with the engine by the ordinary connections. The claim was upon public land. The question presented by this state of facts is, whether the engine and boiler were fixtures. It is contended by appellants that there can be no such thing as a fixture upon public land. We cannot agree with this position. Section 225, page 177, General Statutes, provides that "the terms 'land' and 'real estate,' as used in this chapter, shall be construed as co-extensive in meaning with the terms 'lands,' 'tenements,' and 'hereditaments,' and as embracing all mining claims and other claims, and chattels real." "Occupancy of public land possesses the legal character of real estate." This is the conclusion of this court in *Gillett* v. *Gaffney*, 3 Col. 351. A title by occupation is, under our statute, an interest in real estate, and such an interest as is the subject of conveyance by deed: *Sears* v. *Taylor*, 4 Col. 38. This doctrine in maintained in California: *Merritt* v. *Judd*, 14 Cal. 60; *McKiernan* v. *Hesse*, 51 Cal. 595. Our courts having recognized the interest acquired by occupancy of public land as a legal estate, it necessarily follows that the title to or interest in the land, however de-

fined, carries with it the title to the structure annexed to the soil. Was the property here sought to be recovered a part of the realty? In *Merritt* v. *Judd*, 14 Cal. 60, it was held that "an engine and pump became a part of the realty, although located upon public land." The engine and pump referred to were attached to two timbers ten or twelve feet long, and from twenty to thirty inches in diameter; were placed side by side upon the ground. They were only bedded in the ground sufficiently to make them level. On these bed-timbers was placed a frame of four timbers, each about eight inches in diameter, the side-timbers about seven feet long, and the end ones about three feet. These frame-timbers were bolted or spiked together, and bolted or spiked to the bed-logs. The boiler and the engine were spiked or bolted to this frame. The boiler, engine, and pump were attached together by the usual connections, the pump itself extending into the shaft. Over the whole was a roof or shed, which was constructed merely for the protection or shelter of the machinery. The machinery was not attached to the building in any way, except that the pump was stayed by rods reaching to the rafters of the roof. We give the full statement of facts in that case, because they seem to be analogous to the facts as they appear in the case at bar.

The court, in its opinion, after carefully reviewing a number of authorities, concluded as follows: "We think that the principle to be extracted from the modern cases covers the case at bar; that this apparatus was necessary to the working of the ledge; that it was attached for that purpose permanently to the soil, and its use accessory, if not essential, to the inheritance for its only valuable purpose, — the extraction of the gold." Such seems to be the situation of the property here in controversy. It must be admitted that in order to enjoy the benefits of the mining claim, to develop the mine, and bring to the surface the ore, the engine and boiler here sought to be recovered were absolutely essential. Many cases can be found in the books in which a similar connection with realty made by the owner thereof has been considered a sufficient annexation: *Oves* v. *Ogelsby*, 7 Watts, 106; *Merritt* v. *Judd*, 14 Cal. 60, and cases cited; *Noble* v. *Bosworth*, 19 Pick. 314. The intention of the owner in attaching the machinery must be considered, and if it appears that he attached the property with a view that it should remain there permanently, it must be treated as real estate. This intention is to be inferred

from the nature of the article affixed, the relation and situation of the party making the annexation, the structure and mode of annexing, and the purpose for which the annexation has been made: 1 Freeman on Executions, sec. 114; *Palmer* v. *Forbes*, 23 Ill. 301; *Hunt* v. *Bullock*, 23 Ill. 320; *Titus* v. *Mabee*, 25 Ill. 257. The conclusions reached by the court below are clearly sustained by the law and the evidence. The judgment should be affirmed.

Per CURIAM. For the reasons stated in the foregoing opinion, the judgment is affirmed.

FIXTURES, WHAT ARE AND WHAT ARE NOT: *Horn* v. *Indianapolis Nat. Bank*, 125 Ind. 381; 21 Am. St. Rep. 231; *Vail* v. *Weaver*, 132 Pa. St. 363; 19 Am. St. Rep. 598, and note. A saw-mill, and the engine and boiler connected with and used to operate it, attached to the land in the usual way, are fixtures: *Horne* v. *Smith*, 105 N. C. 322; 18 Am. St. Rep. 903, and note; *Beaupre* v. *Dwyer*, 43 Minn. 485. In determining whether an engine, boiler, and machinery in a saw-mill located upon land sold at sheriff's sale are fixtures, the testimony being conflicting, the question is for the jury: *Benedict* v. *Marsh*, 127 Pa. St. 309.

He who claims chattels to be fixtures must show, — 1. That they were actually annexed to the realty: *Speiden* v. *Parker*, 46 N. J. Eq. 292; 2. That they were adapted to the uses for which they were annexed: *Speiden* v. *Parker*, 46 N. J. Eq. 292; *Langdon* v. *Buchanan*, 62 N. H. 658; 3. That the intention was to make them a permanent accession to the freehold: *Speiden* v. *Parker*, 46 N. J. Eq. 292; *Schaper* v. *Bibb*, 71 Md. 145; *Aldine Mfg. Co.* v. *Barnard*, 84 Mich. 632.

CALIFORNIA INSURANCE COMPANY *v.* GRACEY.

[15 COLORADO, 70.]

INSURANCE — WAIVER OF CONDITION. — A provision in a fire insurance policy that a loss shall be paid sixty days after due notice and proof thereof is waived by the absolute refusal of the company by its agent to pay the loss in any event; and the insured need not wait until the expiration of the sixty days before commencing suit.

INSURANCE — ESTOPPEL BY ACTS OF AGENT. — Where a special agent and adjuster for an insurance company, during negotiations subsequently to a loss, secures an attorney to assist him in investigating it, interviews the insured and his attorney in relation to proofs thereof, seeks to cancel the claim of the assured against the company upon reimbursement of premiums paid, and, without disclosing his want of authority, positively refuses to pay the loss, the company is estopped from setting up and relying upon such want of authority on the part of the agent as a defense.

INSURANCE — DECLARATIONS BY AGENT, WHEN BINDING. — Declarations made by a special agent and adjuster of losses for an insurance company, directly in connection with the business he is authorized to transact, and,

to all appearances, fairly within the scope of his agency, are binding upon the company.

Insurance — Limitation of Power of Agent, when not Binding on Insured. — The power of insurance agents may be limited by the companies, but parties dealing with them as to matters within the real or apparent scope of their agency are not affected by such limitations, unless they have notice thereof.

Practice — Proper Amendment to Complaint. — An amendment curing a defect in a complaint in failing to allege a waiver of a provision in an insurance policy, that a loss should not be payable until sixty days after proof thereof, does not state a new cause of action.

J. W. Horner, for the appellant.

O. E. Le Fevre, for the appellee.

Helm, C. J. It is stated by counsel for appellant that the question for adjudication in this court is, Was the suit prematurely brought? The contract of insurance provides that the sum due, in case of loss, shall be "paid sixty days after due notice and proof of the same, made by the assured, is received at the office of this company." By the pleadings and briefs it is admitted that in the present case the sixty days thus provided for after proof of loss did not elapse before the suit was brought.

But the amended complaint and the replication contain averments intended to show that appellant, by its conduct, waived the right to insist upon compliance with this condition of the contract. It is therein asserted that appellant, through its agent, denied all liability, and positively refused to make payment, declaring that appellee would have to bring her suit therefor. The position is strenuously relied on that, in view of this fact, appellee was not bound to wait the sixty days, or any other particular length of time, before instituting her suit. In response, it is asserted, — 1. That the agent did not positively and absolutely refuse payment of the claim, or tell appellee that she would have to bring suit therefor, 2. That the agent was wholly without any authority to bind the company by such declarations, even if made; and 3. That, as a matter of law, such a refusal by the company itself would not entitle appellee to sue before the expiration of the sixty days. These positions will be considered, though not in the strict order of their statement.

We must hold that the averments of the complaint and replication in this regard are fairly sustained by the proofs. The weight of evidence is decidedly against appellant. Four

witnesses besides appellee testify that Pratt, the agent alluded to, made the assertions substantially as averred; that he said, in substance, the company would not pay the loss, because appellee had designedly burned the property, and if she wished compensation, she must institute her suit; while but two witnesses (Pratt himself, and Horner, the attorney employed to assist Pratt) deny the making of such statements. The verdict, in so far as it rests upon this conclusion of fact, cannot be disturbed.

The stipulation in the policy allowing sixty days for payment of the claim is valid, and therefore binding. Unless waived, a suit brought within that time must be abated. But this provision is purely a matter of contract between the parties. It is not even, as in Iowa and Ohio, made a statutory right. Being a matter of contract alone, and for appellant's benefit, undoubtedly appellant could waive it. By an unqualified denial of liability, and refusal to pay the indemnity provided for, especially when, as in the present case, the refusal is predicated upon the ground that the assured has, by criminal conduct, forfeited all right thereto, such waiver, in our judgment, takes place. The object of the provision is twofold: 1. To enable the company to investigate the causes of loss, and verify the proofs thereof submitted; and 2. To give the company opportunity for making financial arrangements to discharge its obligation. The denial of liability and absolute refusal imply satisfaction with the investigations already made and information already obtained, while since payment is in no event to be made, preparation therefor becomes a matter of no importance whatever. We shall not prolong this discussion by pointing out objections to the supposed analogy in law and fact sometimes referred to between the denial of liability under consideration, and the premature refusal to pay a promissory note, the same not being due. It would be unreasonable, to say the least, for us to hold that, under such circumstances as are here presented, the assured is nevertheless bound by the clause in question, and must wait the expiration of the sixty days before commencing suit. Such is not the law: *Ætna Ins. Co.* v. *Maguire*, 51 Ill. 342; *Cobb* v. *Insurance Co. of N. A.*, 11 Kan. 93.

Insurance policies uniformly contain the provision that the assured shall, in accordance with certain prescribed regulations, give notice and make proof of loss. It is universally held, we believe, that the absolute refusal of a company to pay

the loss in any event constitutes a waiver of the right to insist upon compliance with such provisions: *Atlantic Ins. Co.* v. *Manning*, 3 Col. 224; *Hartford Ins. Co.* v. *Smith*, 3 Col. 422, and cases cited; *Cobb* v. *Insurance Co. of N. A.*, 11 Kan. 93, and cases cited. If the company may thus waive notice and proof of loss altogether, it would be absurd to say that, nevertheless, suit cannot be brought until the expiration of sixty days after such notice and proof have been received at its office. The rule of waiver as to notice and proof would in such case be a mockery, because the assured could not institute legal proceedings until sixty days after he had given the notice and furnished the proof, though both had been previously waived.

But as already stated, appellant insists that in this respect the act of Pratt was not the act of the company; that his declarations were made without authority, and therefore the company was not bound thereby.

According to the testimony of Pratt himself, and of Bromwell, president of the company, Pratt was, at the time of these negotiations, a special agent and adjuster of losses for appellant; but it was his duty, under verbal instructions, to report in all cases the result of his investigations to the company; and he could not upon his own responsibility promise or refuse payment of losses claimed to have been suffered. This testimony is not contradicted; and hence it may be assumed as proven that, under his private verbal instructions, Pratt did not have authority to make the declarations upon which appellee relies.

The matter, therefore, for present consideration is narrowed to the question, Is the company estopped from setting up and relying as a defense upon this want of authority on the part of its agent?

Pratt was the company's accredited representative in all matters connected with the adjustment of losses. He investigated the causes of loss, advised with the assured concerning proofs thereof, determined, if he chose so to do, the amount of loss, and assisted, to a greater or less extent, in the settlement. Unless he saw fit to so expressly state, there was nothing to indicate his want of authority to agree or decline, in behalf of the company, to pay the loss. In the present case, he conferred with appellee and her attorney in relation to the proofs, and to the payment of the amount called for by the policy. It would seem that he employed an attorney on behalf of the company to assist him in conducting the investigation and accompanying negotiations. Together with his attorney he

interviewed appellee, and proposed that she cancel her claim against the company under the policy upon reimbursement of the premium paid by her. As a foundation for that proposition, he and the attorney assured her that they had strong evidence against her of the crime of arson in connection with the fire, — a charge unsupported by proofs at the trial. They did not notify her or her attorney of any limitation whatever upon Pratt's authority in the premises. According to the preponderance of evidence, nothing was said about referring the question of payment to the company. On the contrary, Pratt, speaking, as he supposed, for the company, positively refused to pay her any of the indemnity provided for in the policy. The declarations in question were made directly in connection with the business he was authorized to transact, and to all appearances were fairly within the scope of his agency.

Is it possible that appellee's recovery in this matter is to be controlled by the secret, verbal limitation upon Pratt's authority, of which she had no notice or knowledge? If this be true, then such companies may avoid just liability in many cases by giving their agents secret instructions that are inconsistent with the apparent power and authority vested in and exercised by them. We are of the opinion that, under the circumstances of the present case, the company should not be permitted to deny responsibility for the acts and declarations in question.

"When an insurance company has appointed an agent, known and recognized as such, and he, by his acts, known and acquiesced in by them, induces the public to believe he is vested with all the power and authority necessary for him to do the act, and nothing to the contrary is shown or pretended at the time of doing the act, public policy and the safety of the people demand the company should be liable for such of his acts as appear on their face to be usual and proper in and about the business in which the agent is engaged": *Ætna Ins. Co.* v. *Maguire*, 51 Ill. 342; *Electric L. Ins. Co.* v. *Fahrenkrug*, 68 Ill. 463. The power of insurance agents "may be limited by the companies, but parties dealing with them as to matters within the real or apparent scope of their agency are not affected by such limitations, unless they have notice of the same": *Rivara* v. *Queen's Ins. Co.*, 62 Miss. 720.

The amended complaint was defective because it showed suit begun within less than sixty days after proof of loss, but did not aver matters constituting a waiver of the sixty-day

provision of the contract. The second amended complaint cured that defect. This was not pleading a new cause of action, as contended by appellant. It was perfecting the statement of the original cause of action by the addition of essential averments. The cause of action remained the same; viz., an action at law upon the contract of insurance to recover the sum claimed by virtue of its provisions.

It is unnecessary for us to consume time discussing the objections to the charge. It was in harmony with the law as above stated, and was in some respects even more liberal to appellant than the law required. The judgment is affirmed.

FIRE INSURANCE — WAIVER OF CONDITION REQUIRING PROOFS OF LOSS. — A condition requiring the assured to furnish proofs of loss is waived by the company, when it absolutely denies its liability for any loss and refuses to pay: *German Ins. Co.* v. *Gibson*, 53 Ark. 495; *Norwich Union F. Ins. Co.* v. *Girton*, 124 Ind. 217; *Coryeon* v. *Providence Washington Ins. Co.*, 79 Mich. 187; *Sun Mut. Ins. Co.* v. *Mattingly*, 77 Tex. 162.

FIRE INSURANCE — COMPANY, WHEN BOUND BY UNAUTHORIZED ACTS OF AN AGENT. — When an agent's authority is limited, and the party with whom he deals has notice of such limitation, under no conditions can the company be bound beyond the agent's authority: *Weidert* v. *State Ins. Co.*, 19 Or. 261; 20 Am. St. Rep. 809; but the company is liable for the acts of an agent done within the apparent scope of his authority, notwithstanding private instructions limiting the agent's powers not known to the assured: *Farnum* v. *Phœnix Ins. Co.*, 83 Cal. 246; 17 Am. St. Rep. 233; *Western Home Ins. Co.* v. *Hague*, 41 Kan. 524; *Russell* v. *Insurance Co.*, 80 Mich. 408; *Hoge* v. *Dwelling-house Ins. Co.*, 138 Pa. St. 66. A restriction in a policy upon an agent's authority cannot be construed to refer to the agent's acts prior to the delivery of the policy: *Crouse* v. *Hartford Fire Ins. Co.*, 79 Mich. 249.

FIRE INSURANCE — DECLARATIONS OF AGENT. — The declarations and admissions of an agent empowered to adjust and pay a loss, while acting within the apparent scope of his authority, are binding upon the company: *Bartlett* v. *Fireman's Fund Ins. Co.*, 77 Iowa, 155; *Reynolds* v. *Iowa etc. Ins. Co.*, 80 Iowa, 564.

ARTHUR *v.* ISRAEL.

[15 COLORADO, 147.]

JUDGMENTS RENDERED ON RECORDS SHOWING AFFIRMATIVELY on their face that the court had no jurisdiction over defendant's person are void.

JUDGMENT — ADVANTAGE TAKEN OF VOID DIVORCE DECREE, WHEN AN ESTOPPEL. — When a wife, without cause, deserts her husband and home, lives for years in adultery, and afterwards, learning that a divorce has been procured by her deserted husband, causes a marriage ceremony to be performed with her paramour, and continuously lives and cohabits with him as his wife until the death of her abandoned husband, she cannot take advantage of the fact that the divorce decree is void for want of proper service of process, and successfully assert against the heirs her

right, under the statute, to the estate of the deceased husband as his widow, notwithstanding these facts were not brought to the notice of the court at the time that the divorce decree was adjudged invalid.

JUDGMENT — ESTOPPEL BY TAKING ADVANTAGE OF VOID DIVORCE DECREE. — A husband or wife who accepts the benefits and privileges of a void decree of divorce cannot afterwards repudiate his or her action, and urge its invalidity.

JUDGMENT — ESTOPPEL BY TAKING ADVANTAGE OF VOID DIVORCE DECREE. — Public policy as well as private interest requires that, so far as is consistent with law, one who has attempted to profit by a supposed divorce, and has exercised the resulting privilege of remarriage, shall not, for the mere purpose of obtaining property, be permitted to repudiate his election.

THIS case was previously before the court, and is reported as *Israel* v. *Arthur*, 7 Col. 5. In that case, defendant in error filed a petition alleging that she was the widow and sole heir of John Arthur, deceased, who died intestate, without children; that plaintiff in error, as administrator, was in possession of and speculating with the funds of the estate, and failing to account for the interest, profits, etc. She demanded that her rights be recognized, and that the administrator account accordingly. Defendants filed an answer containing a general denial, and, as a separate defense, admitted the marriage of petitioner and Arthur, but alleged that on February 9, 1875, a decree of divorce was duly granted in favor of Arthur against the petitioner, and that on June 12, 1877, a second decree of divorce of the same nature was duly rendered. The new matter in defense was denied, and the case went to trial upon those issues. The decrees of divorce mentioned were admitted in evidence, against objection, and judgment rendered for defendant in error. This judgment was reversed by the supreme court, and by leave of the court below an amended petition was filed. An amended and supplemental answer was also filed, averring, among other matters, that subsequently to the rendition of the decrees of divorce, the petitioner, with full knowledge thereof, and during the lifetime of Arthur, entered in a contract of marriage with J. H. Israel, and thereupon assumed the relation of wife to him, and subsequently and at all times thereafter, by virtue of such contract, lived and cohabited with him as his wife, until and ever since the death of Arthur; that the following facts have now for the first time become known to the pleader, notwithstanding diligent and persistent efforts made by him to sooner ascertain them; that in October, 1873, the petitioner abandoned Arthur and eloped with Israel, and thereafter and until

the said decrees of divorce were rendered, and the marriage contract solemnized, lived and cohabited with Israel in a state of adultery, representing herself as his wife; "that upon learning of the decrees of divorce and procuring the solemnization of marriage as aforesaid, both petitioner and Israel refrained from making the same public, because of the desire to conceal and secrete from their acquaintances and neighbors the illicit and adulterous relations previously sustained towards each other, and to prevent the scandal and disgrace which must necessarily have arisen from a public marriage, or from a marriage taking place at their usual place of abode, in the usual way." The supplemental answer was demurred to, on the ground that the facts therein stated were insufficient to constitute a defense. The demurrer was sustained, judgment rendered against plaintiff in error, and he appealed.

L. S. Dixon, E. A. Ballard, T. M. Robinson, and Ephraim Love, for the plaintiff in error.

Decker and Yonley, and S. B. A. Haynes, for the defendant in error.

HELM, C. J. The present controversy has been once before submitted to this court for adjudication. There was then, however, nothing in the record to show that Mrs. Israel, after deserting Arthur, and prior to the divorce decrees, had been guilty of immoral conduct; neither was there anything, aside from these decrees, to indicate that she had not, up to the commencement of proceedings therefor, conducted herself as a good, true, and affectionate wife; or that, subsequent to the entry thereof, and with knowledge of the same, she had, during Arthur's lifetime, remarried, and lived and cohabited with another man as his wife. The single question then presented, wholly unembarrassed by any of these considerations, was, whether or not the decrees, which were void because the records showed affirmatively that there was no jurisdiction over the person, should have been received in evidence, and given the same force and effect as if valid and binding. The court held that they should not, and for error in their admission reversed the judgment.

The record now before us, on the contrary, discloses a voluntary acceptance by petitioner of the privileges resulting from the divorce decrees, as well as antecedent conduct on her part that is highly reprehensible from both a legal and a moral stand-point. That petitioner's purpose was to secure

the estate of deceased was known then, as now; but the question as to whether she may accomplish this purpose obviously rests at the present time upon very different considerations from those formerly brought to our attention.

We cannot accept the assertion of counsel for defendant in error that the decision of the court upon the former case is decisive of the present review. We still adhere to the opinion that the decrees in question were void, and not merely voidable; but assuming such invalidity, and giving to the declaration of this court reciting that fact all the force and effect of a final adjudication thereof, we feel warranted in holding that petitioner's right to the estate of Arthur may still be inquired of.

It is to be hoped, for her sake, that the conduct of petitioner is not correctly set forth in the supplemental answer; but the averments of this pleading in that behalf are, by the demurrer, temporarily confessed, and, for the purposes of the present decision, must be treated as true.

The question, therefore, now presented for determination may be stated as follows: When the wife, without cause, deserts her husband and home, and for years lives in adultery with another man, and afterwards, upon learning that a divorce has been obtained by her deserted husband, causes a marriage ceremony with her paramour to be solemnized, and continuously lives and cohabits with him as his wife, may she, upon the subsequent decease of her abandoned husband, take advantage of the fact that the divorce decree is void for want of proper service of process, and successfully assert against other heirs her right, under the statute of descents and distributions, to the deceased's estate as his widow? An affirmative answer to this question would be so shocking to good morals, to sound public policy, and to the simplest principles of justice that we shall decline to give it, unless coerced into doing so by cogent and firmly established rules of law.

As a matter of law, petitioner must, under the circumstances, be presumed to have known before Arthur's death that the divorce decrees were invalid; and it is fair to assume that such in fact was the case, as, besides the grounds upon which the legal presumption rests, she so promptly, after that event, asserted their invalidity. Had she properly challenged those decrees during the lifetime of Arthur, she would have incurred the hazard of a restoration of conjugal rela-

tionship, or of his procurement of a binding divorce. Either of these results was evidently objectionable to her, and both were carefully avoided. She voluntarily elected to postpone action until such time as she might secure all the benefits of the marriage contract without discharging any of its burdens. Abandoning for years the performance of every marital obligation and duty, she awaited until death had rendered such performance impossible, and then boldly hastened to seize all the pecuniary advantages conferred by law upon the faithful wife and bereaved widow. Under these circumstances, petitioner cannot complain if we insist upon treating the present controversy as one relating solely to property rights, unaffected by those legal considerations which give to marriage and the family their peculiar *status*, with accompanying special privileges and protection: *Zoellner* v. *Zoellner*, 46 Mich. 511.

But if the divorce decrees receive the same treatment as judgments or decrees in ordinary controversies relating to damages or property petitioner's action must fail; for one who accepts and retains the fruits of a void judgment cannot afterwards repudiate his action, and take advantage of its invalidity: *Denver etc. Water Co.* v. *Middaugh*, 12 Col. 434; 13 Am. St. Rep. 234, and cases cited; *Duff* v. *Wynkoop*, 74 Pa. St. 300.

The foregoing principle has numerous other salutary applications; as, for instance, that one, having accepted the benefits of an unconstitutional law, cannot, as a general rule, rely upon such unconstitutionality as a defense, even though the invalidity has been adjudicated in another suit: *Daniels* v. *Tearney*, 102 U. S. 415, and cases. Also, that a corporation, having exercised the privileges of its franchise, when sued for its negligent or malicious tort, shall not successfully invoke, as a defense, the plea of *ultra vires: National Bank* v. *Graham*, 100 U. S. 699. And in many cases the same inhibition applies after the benefits of otherwise binding corporate contracts have been enjoyed: *Ohio etc. R. R. Co.* v. *McCarthy*, 96 U. S. 258.

We discover, upon principle, no sufficient reason why petitioner's conduct in the premises should not produce just as effective an estoppel as if she had received the proceeds of a void judgment for money. By her subsequent marriage with Israel during Arthur's lifetime, she accepted, so far as was within her power, the benefits or privileges of the divorce decrees. The fact that she did not then know that those decrees

were void is a matter of no more consequence than is the ignorance in this respect of one who, knowingly in all other particulars, receives the fruits of an ordinary void judgment at law. That at the time of her marriage with Israel she understood the decrees to be valid is, if true, only an additional earnest of her acquiescence in the result, and sincerity in accepting and taking advantage of the benefits supposed to follow. Besides, had she believed them void, her obliquity would be even deeper than it is; because to her other alleged offenses would be added that of intentional fraud upon Israel, who may have thought that he was contracting a valid marriage.

We are not unmindful of the fact that the analogy between accepting the fruits of void judgments at law and accepting the pecuniary benefits, if any there be, together with the privileges of void divorce decrees, is not perfect in all respects. But the importance and justice of recognizing an estoppel in the latter case may be far more weighty than in the former. The immediate parties are not alone concerned. The public is always, and other individuals are usually, profoundly interested. Public policy, as well as private interest, requires that, so far as may be consistent with fundamental principles of law, one who has attempted to profit by a supposed divorce, and has exercised the resulting privilege of remarriage, shall not, for the mere purpose of obtaining property, be permitted to repudiate his election, and thus demonstrate the invalidity of his second marriage, together with the unconscious adultery of his second wife, and the illegitimacy of her children, if any she have by him.

Were petitioner attempting, in the light of the present record, to have the divorce decrees held void, her attempt would be futile. And the fact that upon another and different record this court was induced to declare such nullity is, as already suggested, not conclusive of her right to the property in question. It clearly appears from the admitted averments of the supplemental answer that petitioner herself is responsible for the failure of defendant to sooner plead in bar the facts which operate in the nature of an estoppel by conduct; and since, if these matters had been known in the first instance, petitioner would not, for the purpose of securing Arthur's estate, have been permitted to show the invalidity of the divorce decrees, we unhesitatingly conclude that she should not now be allowed to take advantage of such invalidity in order to accomplish the same result.

The application of a doctrine analogous to that of equitable estoppels to cases which, in essential particulars, strongly resemble the one at bar, is by no means a novelty: *Ellis* v. *White*, 61 Iowa, 644; *Garner* v. *Garner*, 38 Ind. 139; *Prater* v. *Prater*, 87 Tenn. 78; 10 Am. St. Rep. 623; *Duke* v. *Reed*, 64 Tex. 705; *Odiorne's Appeal*, 54 Pa. St. 175; 93 Am. Dec. 683; *Bourne* v. *Simpson*, 9 B. Mon. 454; *Baily* v. *Baily*, 44 Pa. St. 274; 84 Am. Dec. 439; *Richeson* v. *Simmons*, 47 Mo. 20; *Yorston* v. *Yorston*, 32 N. J. Eq. 495; *Sedlak* v. *Sedlak*, 14 Or. 540; *Nichols* v. *Nichols*, 25 N. J. Eq. 60.

In two or three of the foregoing cases the principle of estoppel was applied where wives had abandoned their husbands, and formed adulterous relations with other men, or had simply renounced the marriage tie and forsaken the marital obligations, but where in fact no divorce proceedings were instituted. In at least two of the others the learned judges who prepared the opinions dwell upon laches as well as acquiescence. These decisions are, in the main, well considered, and we have no disposition to reject the particular reasons, so far as applicable, given in support thereof, but we prefer to rest our conclusion especially upon the specific grounds hereinbefore considered.

Petitioner's demurrer to the supplemental answer should have been overruled. The judgment of the court below is accordingly reversed, and the cause remanded for further proceedings.

JUDGMENTS OF COURTS OF GENERAL JURISDICTION are presumed to be right: *Pugh* v. *McCue*, 86 Va. 475; *Wynn* v. *Heninger*, 82 Va. 172; *Stahl* v. *Mitchell*, 41 Minn. 325; except when, from the face of the records, it actually appears that there was a want of jurisdiction: *Great West M. Co.* v. *Woodmas etc. Min. Co.*, 14 Col. 90; *Blanton* v. *Carroll*, 86 Va. 539; *O'Brien* v. *State*, 125 Ind. 33; *Benefield* v. *Albert*, 132 Ill. 655; *Nye* v. *Swan*, 42 Minn. 243; as where it appears that the defendant was not served with process, in which case a judgment rendered against him would be absolutely void: *Finney* v. *Clark*, 86 Va. 354; *People* v. *Pearson*, 76 Cal. 400; *Henderson* v. *Banks*, 70 Tex. 398; *Kimmerle* v. *Houston etc. R'y Co.*, 76 Tex. 686. Void judgments are mere nullities: *Clarion etc. R. R. Co.* v. *Hamilton*, 127 Pa. St. 1; *Bleckeley* v. *Branyan*, 28 S. C. 445; *Reid* v. *Southworth*, 71 Wis. 288. See also *Wilson* v. *Hawthorne*, 14 Col. 530; 20 Am. St. Rep. 290, and note; *Hobby* v. *Bunch*, 83 Ga. 1; 20 Am. St. Rep. 301, and note.

JUDGMENT — ESTOPPEL. — One who accepts and retains the fruits of a void judgment is estopped from assailing it or denying its validity: *Denver City etc. Co.* v. *Middaugh*, 12 Col. 434; 13 Am. St. Rep. 234. One who fails to complain of irregularities in a judgment is presumed to be satisfied therewith: *Knott* v. *Taylor*, 99 N. C. 511; 6 Am. St. Rep. 547. A person who has ratified a decree of divorce cannot thereafter seek to vacate the same: Note to *Greene* v. *Greene*, 61 Am. Dec. 465.

McFETERS v. PIERSON.

[15 COLORADO, 201.]

"OWNER," MEANING OF TERM. — The term "owner," when used alone, imports an absolute owner, or one who has complete dominion of the property owned, as the owner in fee of real property; but its meaning is varied, according to the connection in which it is used, and it is to be understood according to the subject-matter to which it relates.

MINES AND MINING. — TERM "MINING CLAIM" MEANS a parcel of mineral land containing precious metals, and is often used in mining parlance as synonymous with the term "location," which means the act of appropriating a mining claim upon the public domain, according to established law or rules.

MINES AND MINING. — MINING CLAIM ON PUBLIC DOMAIN IS REAL PROPERTY, and the subject of complete ownership as a claim, and the locator thereof, or his successor in interest, having fully complied with the terms prescribed by Congress for acquiring title to mineral lands, is, so long as he continues such compliance, the owner of the claim for all practical purposes. He is the owner before as well as after the issuance of the patent, and is entitled to the exclusive possession as against the whole world.

MINES AND MINING — TITLE AND POSSESSION, HOW PLEADED. — In a civil action for injury to a mining claim, an allegation by plaintiff of ownership and actual possession thereof, describing the same according to the location certificate thereof duly recorded, without alleging ownership in fee, or that a government patent has issued therefor, does not import ownership in fee, nor compel proof of title by patent from the United States.

MINES AND MINING — "MINING CLAIM," ACTUAL POSSESSION NOT NECESSARY TO MAINTAIN ACTION FOR INJURY TO. — To maintain a civil action for injury to a mining claim, it is not necessary that the claimant should reside on the premises, that it should be inclosed or cultivated, nor that he should have a *pedis possessio* thereof. Having made and marked the discovery, filed his certificate, and performed and kept up the work necessary to perfect the claim, and having otherwise complied in good faith with the requirements essential to a valid and subsisting location, and being in the actual and lawful control of the claim for the purpose of working and developing the same, he is entitled to the exclusive possession and enjoyment thereof as against the world, and may maintain an action against a trespasser for an injury to the timber growing thereon, as well as to the mineral product of the soil itself.

MINES AND MINING — AVERMENT OF CITIZENSHIP NOT NECESSARY IN ACTION TO RECOVER AGAINST TRESPASSER ON MINING CLAIM. — In an action to recover from a trespasser for cutting timber on a mining claim, the plaintiff need not allege his citizenship in the first instance, but may rely upon an allegation of possession or title as against the wrong-doer without title or right of possession.

TRESPASS to recover for cutting and carrying away timber standing on plaintiffs' mining claim. Judgment for plaintiffs, and defendants appeal.

Story and Stevens, and T. J. Collins, for the plaintiffs in error.

Stirman and Stewart, and Pence and Pence, for the defendants in error.

ELLIOTT, J. On the trial it appeared that no patent from the United States had ever issued for the mining lode claimed by plaintiffs, and that their title was based upon their location certificate, and other evidence tending to show compliance with the laws of the United States relating to the acquisition of mineral lands.

Counsel for plaintiffs in error contend that such evidence of title, however clear, is not sufficient to support the averments of the complaint; that the complaint avers ownership in the plaintiffs without qualification; and that such averment cannot be sustained, except by proof of a fee-simple title. The argument is, that the locator of an unpatented mining-lode claim upon the public domain, not being in actual possession, and having no interest in the soil other than the mineral product, cannot maintain an action for cutting timber on such claim; that before the issuance of the patent, the title to the soil and the timber thereon is in the United States; and that the United States alone has the right of action for the cutting and carrying away of such timber.

It is true, the term "owner," when used alone, imports an absolute owner, or one who has complete dominion of the property owned, as the owner in fee of real property; but the meaning of a word is often varied, according to the connection in which it is used, and is to be understood according to the subject-matter to which it relates. The term "mining claim," meaning a parcel of mineral land containing precious metals, is often used in mining parlance as synonymous with the term "location," which means the act of appropriating a mining claim upon the public domain, according to law or established rules: *St. Louis Smelting Co.* v. *Kemp*, 104 U. S. 648.

By the act of Congress of May 10, 1872, all valuable mineral deposits in the lands of the United States, and the lands in which they are found, are declared to be open to exploration, occupation, and purchase. The mode of locating such lands is also provided for in general terms, and the locators are granted the exclusive right of possession and enjoyment of the surface included within the lines of their locations.

Moreover, the lands thus located are spoken of as mining claims, and the locators as the owners thereof, antecedent to the entry for the government patent: U. S. Rev. Stats., secs. 2319 et seq.

In *Gwillim* v. *Donnellan*, 115 U. S. 49, a suit brought to determine an adverse claim to mining lands, it is held that "a valid and subsisting location of mineral lands, made and kept up in accordance with the provisions of the statutes of the United States, has the effect of a grant by the United States of the right of present and exclusive possession of the lands located. The location is the plaintiff's title." See also *Forbes* v. *Gracey*, 94 U. S. 767, and *Belk* v. *Meagher*, 104 U. S. 283, where it is declared that mining claims perfected under the law are property in the fullest sense of the term, and that the title thereto passes by descent or purchase, the same as other real property.

Thus it appears that a mining claim on the public domain is real property and the subject of complete ownership as a claim, and that the locator thereof, or his successor in interest, having fully complied with the terms prescribed by Congress for acquiring title to mineral lands, is, so long as he continues such compliance, the owner of the claim for all practical purposes. He is the owner before as well as after the issuance of the government patent, and is entitled to the exclusive possession and enjoyment against every one, including the United States itself.

From the foregoing it follows that when plaintiffs pleaded ownership of the mining claim, describing the same according to the location certificate thereof duly recorded, without alleging that their ownership was in fee, or that the government patent had issued therefor, such averment, being in ordinary language, and appropriate to the subject-matter of the pleading, did not import that they were the owners in fee of the mining claim, and they were not bound to prove their title by patent from the United States.

It is further contended by counsel that there was a variance between the pleading and the proof, or rather a failure of proof in respect to the kind of possession alleged. It is conceded that the evidence tended to establish plaintiffs' claim to the premises under the mining laws of the United States and of this state, and that they had the qualifications required by law to entitle them to make a mining location; but it is insisted that plaintiffs were bound to prove themselves in the

actual possession of the premises, as alleged in their complaint.

To maintain an action for injury to a mining claim, it is not necessary that the claimant should reside on the premises, nor that it should be inclosed or cultivated, nor that he should have a *pedis possessio* of the claim, according to the common acceptation of that term. Having made and marked the discovery, and filed his certificate, having performed and kept up the work necessary to perfect his claim, and having otherwise complied in good faith with the requirements essential to a valid and subsisting location, and being in the actual and lawful control of the claim for the purpose of working or developing the same, he is, while continuing such relations to the property, entitled to the exclusive possession and enjoyment thereof against the whole world. Under such circumstances his possession must be considered sufficient to enable him to maintain an action against any one trespassing thereon; and such action lies for injury to the growing timber, as well as to the mineral product of the soil itself. From a very early period the legislation of this state has expressly given such right of action to any person who may have a title to occupy any mining claim within any mining district of the state: See Col. Rev. Stats. 1868, pp. 532, 533; also Gen. Stats. 1883, secs. 2681, 2685.

In view of these statutory enactments, the defendants not having pleaded title in themselves to the *locus in quo*, the averment that the possession was actual, though broader than necessary, cannot be justly allowed to work a reversal of the judgment. The term "actual" may be rejected as surplusage, and still the complaint contains every averment essential to the maintenance of plaintiffs' action. We remark, however, that the complaint is not to be commended as a model in cases of this kind. It is entirely immaterial whether or not plaintiffs had the technical possession requisite to the maintenance of trespass *quare clausum fregit* at common law; for since they were entitled to the exclusive possession and enjoyment of the mining claim, and had title to occupy the same, they could maintain a civil action under the code for any unlawful injury thereto committed by a stranger without right or title: 2 Waterman on Trespass, sec. 918; Bliss on Code Pleading, sec. 227; *Darst* v. *Rush*, 14 Cal. 82; *Coryell* v. *Cain*, 16 Cal. 567; *Armstrong* v. *Lower*, 6 Col. 393, also 581; *Strepey* v. *Stark*, 7 Col. 614; *Kendall* v. *San Juan S. Min. Co.*, 9 Col.

357; *North Noonday Min. Co.* v. *Orient Min. Co.*, 6 Saw. 299; *English* v. *Johnson*, 17 Cal. 116; 76 Am. Dec. 574; *Halleck* v. *Mixer*, 16 Cal. 574. See 2 Copp's Land-owner, 114, Nov., 1875.

It is further contended that the complaint is defective for want of necessary averments of citizenship. It is true, in a proceeding to settle adverse claims to mineral lands, the plaintiff must allege and prove that he is a citizen of the United States, or that he has declared his intention to become such, in order to obtain the patent; and under the amendment of 1881, the defendant must make like averment and proof, in order to succeed on his part. The supreme court of Idaho seems to have extended this doctrine to actions of trespass; though it was in a case where the defendants not only denied the title of the plaintiff to the mining claim, but also claimed to have located the same themselves: *Bohanon* v. *Howe*, 17 Pac. Rep. 583, Idaho, 1888. But it seems to us there is reason for distinguishing, in the matter of pleadings, between a proceeding to settle adverse claims to mining property and a civil action for cutting and carrying away timber from such property. The former is a statutory proceeding prescribed by act of Congress, the very purpose of which is to settle the title between contesting claimants, and thus lay the foundation for the issuance of the government patent. Hence the pleadings must specially conform to that object. The latter, under our procedure, is an ordinary civil action to recover damages from a wrong-doer; injury to the possession is the gist of the action, and a money judgment is the only relief sought. In actions of the latter class it has always been allowable for the plaintiff to make general averment of his title or possession in the first instance. Besides, the capacity of the plaintiff to sue in an ordinary civil action is generally presumed, and the burden of controverting such authority, if attempted, rests upon the defendant. No such attempt was made in this case. The plaintiffs gave evidence that they, and each of them, were citizens of the United States, and no contradictory evidence was offered on the point. We see no reason to doubt that the evidence was sufficient to satisfy the jury that plaintiffs were citizens of the United States; that they had complied with the requirements essential to the location of a valid mining claim; and that their right thereto was a subsisting one at the time of the injuries complained of: 1 Chitty's Pleading, 195; 2 Waterman on Trespass, secs. 987 et

seq.; *Strepey* v. *Stark*, 7 Col. 618; *Jackson* v. *Dines*, 13 Col. 90; *Thomas* v. *Chisholm*, 13 Col. 105; *Lee Doon* v. *Tesh*, 68 Cal. 50; *Gwillim* v. *Donnellan*, 115 U. S. 49.

It is suggested by counsel in argument that plaintiffs below did not locate their mining claim in good faith for the purpose of working and extracting the precious metals therein found, but for the purpose of removing the timber therefrom. To this suggestion, all we can say is, that the matter is not presented by the record in such manner as that we can take cognizance of it in this proceeding.

The instructions given by the court to the jury were in the nature of a general charge. Objections were not made, nor exceptions thereto reserved, before the trial court in such a manner as to be available on this review, according to the well-settled practice of this court, based upon the soundest principles of justice: *Webber* v. *Emmerson*, 3 Col. 248; *Kansas Pac. R'y Co.* v. *Ward*, 4 Col. 30; *Coon* v. *Rigden*, 4 Col. 275; *Keith* v. *Wells*, 14 Col. 321.

As counsel in their argument have not pointed out any errors occasioned by the refusal to give instructions prayed by defendant, we shall not undertake to consider them.

The judgment of the district court is affirmed.

Definitions — "Owner."— As to the meaning of the word "owner," see *Imperial F. I. Co.* v. *Dunham*, 117 Pa. St. 460; 2 Am. St. Rep. 686; *Heeser* v. *Miller*, 77 Cal. 192; *Turner* v. *White*, 73 Cal. 299; *Norwich etc. R. R. Co.* v. *Worcester*, 147 Mass. 518; *Lee* v. *Smith*, 42 Ohio St. 458; 51 Am. Rep. 839; *Schott* v. *Harvey*, 105 Pa. St. 222; 51 Am. Rep. 201.

Mines and Mining. — For a thorough discussion of the right to mine, the rights and duties of miners, ownership in mining claims, and the manner of acquiring such rights, see note to *McClintock* v. *Bryden*, 63 Am. Dec. 91–110. As to what is embraced in the meaning of the term "mining ground," see *McShane* v. *Carter*, 80 Cal. 310. For definitions of the words "lode" and "placer," see *Gregory* v. *Pershbaker*, 73 Cal. 109.

Mines and Mining — Pleading in Action by Mine-owner. — A pleading not alleging ownership in a mining claim must at least aver the facts that are necessary to constitute such ownership: *Hall* v. *Arnott*, 80 Cal. 349. The plaintiff, a mine-owner, cannot be nonsuited, where the evidence tends to show that he discovered and located the mine, and was in actual possession at the time of defendant's alleged wrongful act: *Patchen* v. *Keeley*, 19 Nev. 404.

Mines and Mining — Pleading — Allegation of Citizenship. — Citizenship need not be alleged by one who owns or claims to own a mining claim, in actions to enforce his rights: *Morris* v. *Lavelle*, 77 Cal. 10; 11 Am. St. Rep. 229, and note. But in determining adverse mining claims, citizenship must be averred: *Keeler* v. *Truman*, 15 Col. 143; *Anthony* v. *Jillson*, 83 Cal. 297.

FIRST NATIONAL BANK *v.* DEVENISH.

[15 COLORADO, 229.]

BANKS AND BANKING — PAYMENT OF CHECK AT RISK OF BANK. — Banks are required, and for their own safety are compelled, to know at all times the balance to the credit of each individual customer, and they accept and pay checks at their own risk and peril. If, from negligence or inattention to their own affairs, banks improvidently pay when the account of the customer is not in condition to warrant it, and if by mistake a check is paid when the drawer has no funds in bank, it must look to the customer for rectification, and not the party to whom the check was paid.

BANKS AND BANKING — MISTAKE IN PAYMENT OF CHECK. — A mistake by one, which is the direct result of his own carelessness and inattention to his own affairs, affords no ground for relief at law or in equity; and a mistake as to the state of a customer's bank account affords no ground of relief for the payment of his check as against the payee, in the absence of an authorized agreement on his part to return the draft received in payment.

BANKS AND BANKING — PAYMENT OF CHECK BY MISTAKE — ALLEGATION AND PROOF — VARIANCE. — An allegation that a bank paid the check of a customer under mistake of fact as to the state of his account is not supported by proof that it held a check drawn in his favor, and falsely represented by him to be good at the time of making such payment, as against the party who received a draft from the bank in payment of the check.

Wolcott and Vaile, for the appellant.

W. S. Uhren and L. B. France, for the appellee.

REED, C. Appellant is a national bank doing business in the city of Denver. In the year 1883, appellee was a private banker doing business at Tin Cup, in the county of Gunnison. Appellant, in the regular course of business, received checks amounting to $312, drawn by one C. F. Caldwell upon the bank of appellee, which were forwarded to its correspondent, one Freeman, at Tin Cup, for collection, and presented on the afternoon of December 27, 1883, at the bank of Devenish & Co., and paid by draft drawn upon the German National Bank of Denver, of which the following is a copy: —

"$312. COCHRAN AND DEVENISH, BANKERS.

"TIN CUP, COL., December 27, 1883.

"Pay to the order of S. N. Wood, cashier, three hundred and twelve dollars. S. G. DEVENISH & Co.

"To GERMAN NAT'L B'K, Denver, Col."

On the afternoon of the next day (December 28th), appellee returned the checks, which had been paid and canceled on the day previous, to Freeman, and asked a return of the

draft, claiming that the checks had been paid through mistake. The draft had been forwarded by Freeman to the appellant at Denver. Appellee, by telegram, stopped the payment of the draft. Appellant did not return the draft, and afterwards instituted this suit to recover the amount, the complaint being in the ordinary form of a bill of exchange.

The defendant, in answer, put in special pleas admitting the presentation and payment of the checks.

"Believing that said Caldwell had on deposit with defendant funds to meet and pay said checks, and in that belief the defendant made and delivered to said Freeman, agent of the plaintiff, the bill of exchange in the complaint herein described; but defendant avers that such bill of exchange was so executed and delivered as aforesaid, by defendant, under a mistake of fact, and that the said Caldwell did not then have, at the time of the making and delivery of said bill of exchange, in the hands of defendant, funds to pay the check for which said bill of exchange was given"; that defendant discovered the mistake about one o'clock the next day (December 28th), when the checks were returned to Freeman, and he was requested to return the draft; that Freeman promised to return the draft, but neglected to do so.

It is also pleaded, as a special defense, that on the 20th of January, 1884, Caldwell deposited with appellee large sums of money, much in excess of the amount of the draft, but that appellee, relying upon the promise of Freeman to return the draft, failed to protect himself, and paid out such deposits on other checks of Caldwell.

These special defenses were fully replied to by the plaintiff. The case was tried to the court without a jury, and judgment found for the defendant, from which this appeal was taken.

The appellee relies, in argument in support of the judgment, upon two propositions: 1. That the payment of the checks was made through such a mistake of fact as legally entitled him to recall it upon discovering the mistake; 2. Upon the supposed rescission of the transaction by delivery of the paid and canceled check to Freeman, the correspondent of appellant, and the demand for the return of the draft, and the supposed acceptance of the checks by Freeman, and their detention by him.

Caldwell was a customer of appellee, — kept his account with them. They were supposed to be informed of his financial standing, and certainly were supposed to know the condi-

tion of his account with them at the time of the presentation of the checks for payment. Banks are required, and for their own safety are compelled, to know at all times the balance to the credit of each individual customer, and they accept and pay checks at their own risk and peril. If, from negligence or inattention to their own affairs, banks improvidently pay when the account of the customer is not in a condition to warrant it, and if by mistake a check is paid when the drawer has no funds, the bank must look to the customer for rectification, not to the party to whom the check was paid.

The supposed mistake relied upon in argument is stated in the pleadings as follows: "That such bill of exchange was so executed and delivered as aforesaid, by defendant, under a mistake of fact, and that the said Caldwell did not have, at the time of the making and delivery of the said bill of exchange, in the hands of the defendant, funds to pay the checks for which said bill of exchange was given, and that defendant discovered said mistake at, to wit, the hour of one o'clock on the afternoon of the twenty-eighth day of December, 1883."

The character of the supposed mistake, as stated in pleading and shown in evidence, was such as to preclude appellee from availing himself of it as a defense. It being the direct result of carelessness and inattention to his own affairs, there can be no relief at law, and even in equity courts will seldom, if ever, relieve a man from the result of a mistake attributable to negligence or want of diligence in his own affairs: Kerr on Fraud and Mistake, 407; *Beaufort* v. *Neeld*, 12 Clark & F. 248; *Leuty* v. *Hillas*, 2 De Gex & J. 110; *Western R. R. Corp.* v. *Babcock*, 6 Met. 346; *Ferson* v. *Sanger*, 1 Wood. & M. 138; *Wood* v. *Patterson*, 4 Md. Ch. 335.

An examination of the evidence shows that it utterly failed to support the allegation in the answer in regard to a mistake.

S. G. Devenish, in substance, testified that at the time of the presentation of the Caldwell checks, on December 27th, for which a draft was drawn, Caldwell was a customer of his bank; that he had no money to his credit in the bank; that prior to that date, on December 19th, Caldwell had left with the bank for collection a check on the First National Bank of Leadville for $150, which he represented would be paid; that relying upon such assurances as to the check for $150, he accepted the checks of Caldwell on the 27th for $312, and drew the draft in controversy; that at one o'clock, P. M., of the 28th,

he found that the representations of Caldwell in regard to the Leadville check of $150 were false, and the check unpaid; that he then caused the checks of Caldwell to be returned to Freeman, and requested a return of the draft. It is apparent at once that the supposed mistake attempted to be proved was not the one alleged in the pleading. It is perhaps needless to say that the supposed mistake established by the evidence is not such a one as to be cognizable at law as a ground for the rescission of an executed transaction between the parties to this suit. It was not a mutual mistake to which appellant was a party, or of which he was supposed to have any information. It seems, at most, when explained, a case of misplaced confidence of appellee in the statements of a customer on the strength of which money was advanced to the customer and paid to appellant. Such mistakes are not such as are defined as mistakes in the books and remedied in courts.

We do not see how the last special defense, viz., that Caldwell afterwards deposited large sums of money which appellee, relying upon the promise of Freeman to return the draft, paid out on other checks, can aid him. Mr. Devenish testified that on the second or third day of January, 1884, about midday, he informed Freeman of his surprise at having received a notice of protest of the draft in question. Consequently, he knew at that time that the draft was being retained by the appellant, and he held for its payment on refusal of the German National Bank to accept it; and on the 20th of January he knew it had not been returned, nor he relieved from his responsibility on his outstanding draft. Why did he not protect himself when he had an opportunity and full knowledge of the facts? If appellee considered the transaction rescinded, and the checks of Caldwell unpaid by the draft, good faith required that he should have paid them from the deposited funds, knowing them to be outstanding and unpaid. His failure to protect himself when opportunity offered cannot well prevail as a defense in the action.

The defense made is not tenable on the ground of mistake, and if allowed to prevail could only succeed upon full proof of the agency of Freeman, and his authority to bind appellant by an agreement to rescind, and proof that he did make the contract and promised to return the draft. The testimony fails to establish any such agency. It shows him to have been a merchant to whom appellant sent checks on the bank

of appellee for collection, which he collected, and remitted the proceeds, generally in drafts drawn upon its correspondent, the German National Bank. Appellee did not attempt to prove anything further in regard to the scope of Freeman's agency. Freeman testified that that was the only agency or connection he had with appellant.

The testimony also fails to establish any agreement of Freeman to rescind and return the draft. The interview with Freeman was not by Devenish, as he was indisposed, but between Mr. Uhren, representing Devenish, with Mr. Freeman.

Mr. Uhren testified as follows: "I took the checks, with that mark on the upper left-hand corner in pencil, and the signature had been canceled; that is, by drawing a line across it with a pen. Took them over to Mr. Freeman and explained the circumstances to him, very shortly, as I was very busy. He took the checks. He said he could not give me the draft, because it was in the post-office, but that the matter would be all right. I left the store and went home, and heard no more about it until it was protested; and afterwards the suit was brought."

"*The Court* — Did he say to you that he would make the matter all right? A. I understood the draft would be returned. He could not give it to me at that time, because it was in the post-office. I do not think he said in express words, 'I will have the draft returned.' I cannot say exactly what his language was at this time."

The testimony of Mr. Freeman was as follows: "I am under the impression that it was a couple of days after the defendant Devenish paid the Caldwell checks that Mr. Uhren brought the said checks back and left them with me. I know it was one day, and I think it was two. I did not, at the time Mr. Uhren returned the Caldwell checks to me, or at any time afterwards, agree to return the draft in controversy to the defendant. I believe I said I would write down about it, which I afterwards did. I did not ever accept, for the plaintiff in this action, the said Caldwell checks from the defendant Devenish, or from Mr. Uhren as his agent. I told Mr. Uhren at the time he left the checks with me that I had sent the draft off. I did not, on the 2d or 3d of January, 1884, at the defendant's bank in Tin Cup tell him that I was surprised that his draft had been protested, and that it would be all right as soon as the plaintiff received the letter, for at that time I had not written the plaintiff about the mat-

ter. It was about a week afterwards that I wrote. I did not, as agent of the plaintiff, accept the Caldwell checks given for the draft in controversy. I had no authority from plaintiff to accept from defendant the said Caldwell checks for said plaintiff."

For the reasons above given, we advise that the judgment be reversed and the cause remanded.

RICHMOND, C., and BISSELL, C., concur.

Per CURIAM. For the reasons stated in the foregoing opinion, the judgment of the court below is reversed.

BANKS AND BANKING — PAYMENT OF CHECK BY MISTAKE. — A bank is bound to know the condition of its depositor's account; and if it pays money out under a mistake in this respect, it must abide the consequences: *Manufacturers' Nat. Bank* v. *Swift*, 70 Md. 515; 14 Am. St. Rep. 381, and note.

BECKETT *v.* CUENIN.

[15 COLORADO, 281.]

JURISDICTION — SERVICE BY PUBLICATION. — Jurisdiction over defendant is acquired in cases of service of summons by publication only when the statutory requirements are successively and accurately taken.

JURISDICTION — ORDER FOR SERVICE BY PUBLICATION. — An order for publication of summons must be based upon an affidavit by plaintiff showing affirmatively an existing cause of action against defendant; otherwise the court acquires no jurisdiction over defendant.

JUDGMENTS — COMPLAINT NECESSARY TO SUPPORT. — A judgment of a court of record, not based upon a complaint or written statement of the cause of action, is void.

THIS action was commenced by filing in court an undertaking and affidavit for attachment. A writ of attachment and a summons issued, the latter reciting that plaintiff demanded judgment for one thousand dollars, and interest, and for attorneys' fees, and for costs of suit. Afterwards, plaintiff filed an affidavit, as follows: —

"Dexter T. Sapp, being duly sworn, says that he is the attorney for the plaintiff in the above-entitled cause; that this action is brought to recover of defendants the sum of $1,120.97 upon two promissory notes of $500 each, dated August 14, 1884, with interest thereon at the rate of ten per cent per annum from said date, and also ten per cent attorneys' fees, as provided in said notes; that said William D. Beckett and John M. Beckett compose the copartnership of said Beckett Broth-

ers; that upon the seventeenth day of July, 1886, a writ of attachment was issued in this cause, and placed in the hands of the sheriff of said Gunnison County for service; that on said day a writ of summons was issued in this cause in due form, subscribed 'Brown and Sapp, attorneys for plaintiff,' which summons was placed in the hands of the sheriff of Gunnison County for service upon said defendants; that the defendants William D. Beckett and John M. Beckett now reside at Hastings, in the county of Clay, state of Nebraska, as deponent is informed by Louis Boisot, of Gunnison, Colorado, said Boisot having been the attorney of said Becketts, and as deponent also believes, from having received letters from said defendants which were mailed at said Hastings; that at no time since the issuing of summons in this case has either of said defendants been within the state of Colorado; that the sheriff of Gunnison County has returned to this court the summons issued herein, and placed in his hands for service as aforesaid, with his indorsement thereon to the effect that he cannot find the said defendants in his county; that personal service of said summons can be had upon said defendants at said Hastings, in the state of Nebraska, but cannot be had upon either of them in the state of Colorado, as deponent is informed as aforesaid, and as he believes; that the defendants are a necessary and proper party to the action, for the reasons,—1. That there are no other defendants, and no person or persons liable for the debt sued for; 2. That by virtue of the writ of attachment issued in this cause, real property owned by one of the defendants, and situate in the county of Mesa, in this state, and debts owing to said defendants, have been attached by garnishment in the said county of Gunnison, and without some kind of service of summons in this cause it will be impossible to have the property and debts so attached applied towards the payment of the claim in this cause sued for. Wherefore affiant asks that an order of court may be granted that the service of said summons be made by the publication thereof.

"Subscribed and sworn to before me this twenty-first day of September, A. D. 1886. EDWARD P. COLBORN,
"Judge and Acting Clerk."

Judgment for plaintiff, and defendant appeals. Other facts are stated in the opinion.

Bell, Goudy, and Boisot, for the appellants.

BISSELL, C. The errors contained in this record leave no basis upon which the judgment can be sustained. The service was made by publication, and the order therefor was entered upon the affidavit which is set forth in the statement. It is an established principle in all courts that the method of acquiring jurisdiction by publication is in derogation of the common law, and that the statutory requirements must be successively and accurately taken in order to confer upon the court jurisdiction over the defendant. This principle has been so often decided and so universally declared that it is wholly unnecessary to cite authorities in support of the proposition. The application of this rule precludes any successful defense of the order of publication which was entered by the county court.

To justify the making of the order, the plaintiff was bound, under section 44 of the code, to file an affidavit by which it should appear that a cause of action existed against the defendants. No such showing was made in this case, according to any reasonable construction of the section. The affidavit does not state that any cause of action exists in favor of the plaintiff, or against the defendants, nor is this fact otherwise made affirmatively to appear in it. It sets up that the action is brought to recover the sum of $1,120.97 upon two promissory notes, which are described as to the date of their execution, but it does not state either that the defendants were the makers of those two notes, or the guarantors thereof against whom a right of action existed in favor of the plaintiff, or that they were the payees and subsequent indorsers, or indorsers thereof and not payees, or that the plaintiffs were the owners and holders of the notes. The affidavit states no cause of action whatsoever against these two defendants, or either of them, upon the two notes as described. Under these circumstances, it is wholly impossible to uphold the jurisdiction of the court in the premises: *Ricketson* v. *Richardson*, 26 Cal. 149; *Yolo Co.* v. *Knight*, 70 Cal. 432; *Slocum* v. *Slocum*, 17 Wis. 150, 155; *Towsley* v. *McDonald*, 32 Barb. 604; *Shields* v. *Miller*, 9 Kan. 390; *Atkins* v. *Atkins*, 9 Neb. 191–194.

It is exceedingly doubtful whether there is any such showing of non-residence as would entitle the plaintiff to proceed to obtain service by publication; but the insufficiency of the affidavit renders it unnecessary to put the decision upon this ground.

The failure to file a complaint prior to the rendition of judgment, or at all, is a fatal irregularity. According to the practice as it existed at that time, it was necessary that the complaint should be filed before the entry of judgment: Sess. Laws 1885, p. 132, sec. 9 of "An act to amend," etc.

Whether the failure to file the complaint prior to the entry of judgment would of itself have been fatal to the validity of the judgment, or whether upon application for the purpose prior to the appeal the court could have made an order permitting it to be done, it is not necessary to consider. No such application was made, nor was any complaint ever filed. On general principles, regardless of this statute, it must be held that a complaint, or some written statement of the cause of action, is absolutely indispensable to the maintenance of a judgment recovered in a court of record. As it was well put in *Young* v. *Rosenbaum*, 39 Cal. 654: "It would seem impossible to maintain in any forum a judgment unless it was based upon a complaint or a statement of the cause of action of the party in whose favor it was rendered."

These errors render it impossible to maintain the judgment. Since the cause must be reversed, it is needless to discuss the question whether it should be reversed because it was entered for more than the sum which the plaintiff was entitled to recover according to the action as he instituted it, or whether he should be permitted to remit the excess, and the judgment be upheld for the balance.

The judgment should be reversed, and the cause remanded for further proceedings.

RICHMOND, C., and REED, C., concurred.

Per CURIAM. For the reasons stated in the foregoing opinion, the judgment below is reversed.

PROCESS — PUBLICATION. — Service of summons by publication can be made only in the manner prescribed by statute: *Byrnes* v. *Sampson*, 74 Tex. 80; *Cassidy* v. *Woodward*, 77 Iowa, 355; *Northcraft* v. *Oliver*, 74 Tex. 163.

An order for publication of a summons must be based upon an affidavit showing a cause of action, and that defendant is a non-resident: *Anderson* v. *Goff*, 72 Cal. 65; 1 Am. St. Rep. 34; *Frybarger* v. *McMillen*, 15 Col. 349; *Calvert* v. *Calvert*, 15 Col. 390; *Chase* v. *Kaynor*, 78 Iowa, 449; *Essig* v. *Lower*, 120 Ind. 239; *United States etc. Co.* v. *Martin*, 43 Kan. 526; *Pelbert* v. *Wilson*, 38 Minn. 341; *Elting* v. *Gould*, 96 Mo. 535; *Britton* v. *Larson*, 23 Neb. 806; *Bryan* v. *University Pub. Co.*, 112 N. Y. 382; *Pursel* v. *Deal*, 16 Or. 295.

JUDGMENTS — COMPLAINT NECESSARY TO SUPPORT. — While the complaint in an action commenced in a court of general jurisdiction need not

allege jurisdictional facts: *Shewalter* v. *Bergman*, 123 Ind. 155; yet it must set forth a cause of action by alleging facts sufficient to authorize the court to render a judgment: *Kimmerle* v. *Houston etc. R'y Co.*, 76 Tex. 686; as a judgment cannot be based upon facts not pleaded: *Paddock* v. *Lance*, 94 Mo. 283; *Mickley* v. *Tomlinson*, 79 Iowa, 383; *Jones* v. *Davenport*, 45 N. J. Eq. 77; *O'Leary* v. *Durant*, 70 Tex. 409; *First Nat. Bank* v. *Williams*, 126 Ind. 423; *Wagner* v. *Winter*, 122 Ind. 57. It is not necessary, however, that a judgment should state upon which part of a verdict upon special issues it is based: *Heflin* v. *Burns*, 70 Tex. 347. In determining the effect of a judgment, the antecedent record may be considered: *McDonald* v. *Frost*, 99 Mo. 44. There can be no judgment rendered on the pleadings where a single issue is made by the answer: *Widmer* v. *Martin*, 87 Cal. 88.

BLYTHE *v.* DENVER AND RIO GRANDE R'Y CO.

[15 COLORADO, 333.]

CARRIERS — ACT OF GOD — PROXIMATE CAUSE — NEGLIGENCE. — A gale of wind of such violence as to make it impossible for a person to stand or walk at the time an express-car is derailed by it, and thrown into such position that the express packages therein are piled in one corner at the top of the car, after which it is so quickly consumed by fire set by a stove or lamp therein that the express-messenger only escapes with difficulty, is such act of God and proximate cause of the loss of an express package contained in the car as will excuse the railroad company from liability for the loss, or for negligence in failing to protect and secure the goods in the burning car.

CARRIERS — PROXIMATE AND RESULTING CAUSE. — When the immediate resulting cause of loss by a carrier is fire caused by the overturning of a car by a violent wind, an instruction that "where one is pursuing a lawful vocation in a lawful manner, and something occurs which no human skill or precaution could foresee or prevent, and as a consequence the accident takes place, this is called 'inevitable accident,' or the 'act of God,'" is not prejudicial, although not technically correct.

ACTION against a common carrier for the loss of an express package. Judgment for defendant, and plaintiffs appealed.

Lucius P. Marsh, for the plaintiffs in error.

Wolcott and Vaile, for the defendant in error.

REED, C. It is conceded that the wrecking of a portion of the train, such portion consisting of one engine and four cars, one being the express-car in which the goods were being carried, was by "the act of God," and inevitable. It is also conceded in argument that having a coal fire burning in a stove, and a lighted lamp in the compartment, as testified to, was not negligence on the part of the carrier. Counsel for plaintiffs in error, in reply, say: "In the brief of defendant

in error, counsel have assumed for us a claim which we have not made, and they then proceed to demolish such assumed claim. They assume for us that we claim there was negligence in carrying in the car a stove with fire in it. There was negligence,—we may call it by that name,—but such negligence was in not making the requisite efforts to save the goods after the peril had been incurred. We make no claim that there was negligence in carrying a stove in the car." By these concessions, two important questions are eliminated, and the issues are narrowed, the only questions remaining being: 1. Was "the act of God" the proximate and direct cause of the loss sustained, so as to exonerate the carrier from liability? or was it the remote cause, and the fire, against which the carrier is supposed to be an insurer, the proximate and direct cause? 2. After the wrecking and overturning of the train by "the act of God," was the carrier guilty of negligence in failing to protect and secure the goods in the burning car?

Great ability and research have been expended in attempting to arrive at and determine upon some general definition of the terms "proximate" and "remote" causes, and establish a rule and a line of demarkation between the two. Such efforts appear to have been but partially successful. Both have received various definitions, though differently worded, amounting to practically the same thing. But in almost every instance where they have been attempted to be applied, their applicability seems to have been determined by the peculiar circumstances of the case under consideration. Webster defines "proximate cause," "that which immediately precedes and produces the effect, as distinguished from the remote, mediate, or predisposing cause." Anderson's Law Dictionary: "The nearest, the immediate, the direct cause; the efficient cause; the cause that sets another or other causes in operation, or dominant cause." But with these definitions in view, when two causes unite to produce the loss, the question still remains, Which was the proximate cause?

In *Louisiana Mut. Ins. Co.* v. *Tweed*, 7 Wall. 52, the late lamented Mr. Justice Miller said: "We have had cited to us a general review of the doctrine of proximate and remote causes as it has arisen and been decided in the courts in a great variety of cases. It would be an unprofitable labor to enter into an examination of these cases. If we could deduce from them the best possible expression of the rule, it would

remain after all to decide each case largely upon the special facts belonging to it, and often upon the very nicest discriminations."

In *Howard Fire Ins. Co.* v. *Norwich etc. Trans. Co.*, 12 Wall. 199, in delivering the opinion of the court, Mr. Justice Strong said: "And certainly that cause which set the other in motion, and gave to it its efficiency to do harm at the time of the disaster, must rank as predominant."

In *Milwaukee etc. R'y Co.* v. *Kellogg*, 94 U. S. 475, it is said: "The inquiry must therefore always be, whether there was any intermediate cause disconnected from the primary fault, and self-operating, which produced the injury."

In *Ætna Ins. Co.* v. *Boon*, 95 U. S. 130, it is said: "The proximate cause is the efficient cause; the one that necessarily sets the other causes in operation. The causes that are merely incidental, or instruments of a superior or controlling agency, are not the proximate causes and the responsible ones, though they may be nearer in time to the result. It is only when the causes are independent of each other that the nearest is, of course, to be charged with the disaster."

Leaving out of consideration, as we must, by concession of counsel, all question of negligence in regard to the burning fire in the stove, a lighted kerosene lamp, and regarding each of them as securely protected against damage as prudence would require, and applying the rules above laid down, it becomes apparent that the overturning and wrecking of the car by the violence of the wind was the proximate, direct, and efficient cause of the loss, and the fire following, if not instantaneously, immediately after, without negligence or any wrongful act of the carrier intervening to produce it, must be regarded as resulting and incidental.

It is ably contended in argument, and many supposed authorities in support of the position are cited, that the negligence of the carrier in failing to use proper exertion to save the contents of the car, after it was overturned, rendered the defendant liable for the loss. If by proper diligence and attention the goods could have been rescued, a failure to secure them would have fixed the liability of the carrier. There can be no doubt of the correctness of this conclusion.

The questions what was the proximate cause of the loss and of negligence were questions of fact to be determined by the jury from the evidence, under proper instructions from the court. There was not much conflict of testimony. In *Mil-*

waukee etc. R'y Co. v. *Kellogg*, 94 U. S. 475, it is said: "In the nature of things, there is in every transaction a succession of events, more or less dependent upon those preceding, and it is the province of the jury to look at this succession of events or facts, and ascertain whether they are naturally and probably connected with each other by a continuous sequence, or are dissevered by new and independent agencies; and this must be determined in view of the circumstances existing at the time."

The jury found as a fact that the "act of God" was the proximate cause, and also found as a fact that there was no negligence. Viewed in the light of all the evidence, and of attendant circumstances, the finding of the jury was fully warranted. The force of the gale was such as to blow the cars from the track over the embankment. It was shown to be almost impossible for men to stand or walk, and they were compelled to prostrate themselves under the lee of the track or bank to escape its fury. The air was so full of dust and flying material that scarcely anything could be seen. The car contained inflammable material, and the fire succeeded the overturning almost instantaneously. The messenger escaped with great difficulty, and not without injury from the flames. The position of the car was such that all movable goods must have been hurled into the corner of the top of the car. From the force of the wind and combustible material of the car, it is obvious that the destruction of the car and contents was inevitable in a very brief space of time, and that any attempt to rescue the goods would have been unavailing.

Considerable criticism is directed to the instructions of the court. Some of those criticised, and upon which errors are assigned, are in regard to negligence in the use of the stove and lamp. As counsel concedes in his final argument that there was no negligence in that respect, a review of them becomes unnecessary. Considerable attention is given to the eighth instruction, in which the learned judge charged: "Where one is pursuing a lawful avocation, in a lawful manner, and something occurs which no human skill or precaution could foresee or prevent, and as a consequence the accident takes place, this is called 'inevitable accident' or the 'act of God.'" The objection urged is more technical than substantial. While it is, possibly, not technically correct, and while there is a legal distinction between "inevitable accident" and the "act of God," we can see nothing in it to the prejudice of the

plaintiff, or that could have misled the jury. The immediate resulting cause producing the loss was the fire, which might properly be termed an "inevitable accident" growing out of the former disaster; while the direct cause of the agency that worked the destruction was the "act of God," putting the resulting agent at work. We think the charge, taken as a whole, was a fair and impartial statement of the law, and should be sustained. We advise that the judgment be affirmed.

RICHMOND, C., and BISSELL, C., concurred.

Per CURIAM. For the reasons stated in the foregoing opinion, the judgment of the court below is affirmed.

CARRIERS OF GOODS — LIABILITY FOR LOSS — ACT OF GOD. — As to what is an act of God, such as will excuse a carrier from liability for loss to goods in course of carriage, see *Norris* v. *Savannah etc. R'y Co.*, 23 Fla. 182; 11 Am. St. Rep. 355, and particularly note 362–366; *Gulf etc. R'y Co.* v. *Levi*, 76 Tex. 337; 18 Am. St. Rep. 45; *Haas* v. *Kansas City etc. R. R. Co.*, 81 Ga. 792; *Slater* v. *South Carolina R'y Co.*, 29 S. C. 96.

LAHAY v. CITY NATIONAL BANK.

[15 COLORADO, 389.]

FALSE REPRESENTATIONS — RECOVERY OF MONEY PAID IN CONSEQUENCE OF. — Where a bank innocently and ignorantly pays money to the holder of an instrument, relying upon the false representation of a third person that he knows the holder to be the true payee, it may recover from such person the amount which it is afterwards compelled to pay to the true payee in consequence of its reliance upon such representations. The statute of frauds is not a defense in such case.

FRAUD — PROOF OF INTENT. — The intention of one party to deceive and defraud another is sufficiently made out by showing that a false affirmation has in fact been made by the party concerning a matter about which he has no actual knowledge, under circumstances showing that the matter spoken about was better known to the party making the representations than to the other party.

FALSE REPRESENTATIONS — LIABILITY OF PARTY MAKING. — When one positively assures another that a certain statement is true, knowing it to be false, and professing at the time to speak of his own knowledge, and about a matter not known to the party to whom the representations are made, he is not allowed to complain that too much reliance has been placed upon the truth of his statement, and is liable for all damages resulting therefrom.

THIS action was brought by the City National Bank of Denver against Lahay, to recover the amount, with interest and costs paid by such bank to the wrong party upon the following instrument: —

"FIRST NATIONAL BANK OF CHICAGO.

"CHICAGO, 7, 8, 1885.

"CITY NAT'L BANK, DENVER, COL.

"Your account has credit for six hundred dollars, deposited by J. Phillipe for use of John Phillipe. Confirmation of above will be given in our advice of this date.

"$600. J. CHAPMAN, Teller."

This instrument came into the hands of one P. D'Armenthal, who applied to the bank for payment, representing himself to be John Phillipe, and indorsed that name thereon, representing the same to be his name and signature. Both John Phillipe and P. D'Armenthal and their handwriting were unknown at the bank, which refused to pay until John Phillipe should be identified. Lahay, in whom the bank reposed special trust and confidence, and upon whose statement it relied, appeared and identified D'Armenthal as the said John Phillipe, well knowing the falsity of such identification, and of the statement made by him that he knew said D'Armenthal to be John Phillipe, of his own knowledge. Thereupon the bank, relying upon such identification and statement, paid the amount named in the said instrument to D'Armenthal. This amount, together with interest and costs, was afterwards recovered by the true John Phillipe against the bank, and the bank seeks to recover this sum, together with costs, from Lahay, and in the court below obtained judgment as prayed. Lahay appeals.

Rogers and Webber, and C. W. McCord, for the appellant.

Benedict and Phelps, for the appellee.

HAYT, J. The allegations of the complaint are established by a large preponderance of the evidence introduced at the trial. In addition to this, we have the findings of the trial court in support thereof. The only question to be considered upon this appeal therefore is, Are the facts as pleaded sufficient, under the law, to give appellee a right of recovery as against appellant?

The action is founded upon the deceit practiced upon appellee by appellant, by means of which appellee was induced to pay the amount of the certificate to D'Armenthal, who had no claim to the money, instead of to John Phillipe, who alone was entitled to receive the same. Counsel contend, however, that appellant is not liable on account of his false statement, because he is not shown to have had knowledge of its falsity at the time of making the same. The question thus presented

was before the court, and carefully considered in an early case: See *Sellar* v. *Clelland*, 2 Col. 532. It was then held that the intention of one party to deceive and defraud another was sufficiently made out by showing that a false affirmation had in fact been made by the party concerning a matter about which he had no actual knowledge, under circumstances showing that the matter spoken about was better known to the party making the representations than to the other party. And to the general rule requiring a party relying upon false representations to show, not only that they were false, but that the party making the same knew such to be the case, some exceptions were pointed out; as when one, as in this case, positively assures another that a certain statement is true, professing at the time to speak of his own knowledge, and about a matter not known to the party to whom the representations are made, he cannot be allowed to complain because another has placed too much reliance upon the truth of what he himself has stated. In the language of the learned judge writing the opinion in the case of *Sellar* v. *Clelland*, 2 Col. 532: "In such a case, the proof would seem to be complete when it was shown that the defendants made the representations; that they were made to induce plaintiffs to enter into the contract; that relying upon the same, they did enter into the contract; that the representations were false; that the plaintiffs sustained damage; and that such damage was occasioned by reason of the falsity of such representations."

The statute of frauds and perjuries cannot be invoked in this case to shield appellant. His liability does not grow out of any special promise to answer for the debt, default, or miscarriage of another; nor is he sought to be held upon any agreement required to be in writing. Appellant is shown to have stated as of his own knowledge that Paul D'Armenthal was in fact John Phillipe, and that this representation was made for the express purpose of inducing appellee to pay over the money. It is also shown that the bank, relying upon such representation, did pay the money to D'Armenthal, supposing him to be the John Phillipe entitled to receive the same. The representations were in fact false, and damages were sustained thereby. Every element necessary to a recovery under the decision in *Sellar* v. *Clelland*, 2 Col. 532, was here made out. The correctness of the decision in that case is not questioned. It is well supported by authority, and must control here.

The judgment will accordingly be affirmed.

FRAUDULENT REPRESENTATIONS — LIABILITY OF PERSON MAKING. — False representations by third persons will render him liable, if made with intent to defraud: *Bean* v. *Herrick*, 12 Me. 262; 28 Am. Dec. 176, and note.

FRAUDULENT REPRESENTATIONS — RECOVERY OF MONEY. — Where one is induced to pay money by fraudulent representations, he may recover the money paid by him of the person making such representations: *Moore* v. *Shields*, 121 Ind. 268.

FRAUD. — FRAUDULENT INTENT, HOW PROVED: See *Bullitt* v. *Farrar*, 42 Minn. 8; 18 Am. St. Rep. 485. Fraudulent intent must be proved, but it may be inferred from the fact that a material false statement has been made with knowledge of its falsity: *Haven* v. *Neal*, 43 Minn. 315. So where a party who is in a position to know the truth makes a representation as to a material matter which is untrue, a fraudulent intent may be inferred: *Haven* v. *Neal*, 43 Minn. 315; *Mayer* v. *Salazar*, 84 Cal. 646.

FRAUDULENT REPRESENTATIONS MADE BY ONE KNOWING THEM TO BE UNTRUE, to one who knows nothing of the matter, whereby the latter is induced to act to his injury, the former must answer for such damages as are caused by such representations: Note to *Cottrill* v. *Krum*, 18 Am. St. Rep. 555.

TRAVELERS INSURANCE COMPANY *v.* MCCARTHY.

[15 COLORADO, 351.]

ACCIDENT INSURANCE — DEATH FROM INTENTIONAL ACT OF ANOTHER. — Under a provision in an accident insurance policy that the company shall not be liable for "intentional injuries inflicted by the insured or any other person," the fact that the insured is shot and killed by the intentional act of another precludes recovery under the policy, and an answer by the company, stating that the death of the insured was caused by intentional injuries inflicted by another during a personal altercation between them, states a good defense.

Markham and Dillon, for the appellant.

J. L. Murphy, and Browne and Putnam, for the appellee.

RICHMOND, C. This is a suit upon what is commonly called an "accident policy of insurance." There was a judgment against the company for the sum of $1,016.67, besides costs. The case is here upon alleged errors of law committed by the court in sustaining a demurrer to defendant's answer. The policy sued upon by its terms insured the life of John F. McCarthy in the sum of one thousand dollars, to be paid to his wife, Julia McCarthy, if surviving, within ninety days after sufficient proof that the insured, at any time within the continuing of the policy, shall have sustained bodily injuries, effected through external, violent, or accidental means, within the intent and meaning of the contract. The policy of insurance is set out in the complaint *in hæc verba*, and contains

the following clause: "This insurance does not cover disappearances; nor injuries of which there is no visible mark upon the body; nor accident nor death or injury resulting wholly or partly, directly or indirectly, from any of the following causes, or while so engaged or affected: Suicide, sane or insane; intentional injuries (inflicted by the insured or any other person); intoxication or narcotics; dueling or fighting, war or riot."

In addition to the usual allegations in actions upon such policies, the plaintiff sets out in the complaint that on the third day of November, A. D. 1886, and while said insurance policy was in full force, and while the said insured was in the peace of the state, he received a personal injury which caused his death within ninety days thereafter, and on the day aforesaid, and that said injury which caused his death was through external, violent, and accidental means, within the meaning of the said policy of insurance and the conditions and agreements therein contained, to wit, by being shot by a leaden bullet from a pistol loaded with powder and leaden bullets in the hands of one Daniel Monahan, and while the said insured, John F. McCarthy, was standing on the public highway, near the town limits of the said city of Leadville, in the county of Lake, and state of Colorado.

To the complaint the defendant answers, and denies that the death of the insured was occasioned by bodily injuries affected through external, violent, and accidental means, within the meaning of the contract of insurance; that death was caused by intentional injuries inflicted by Daniel Monahan while said Daniel Monahan and the said John F. McCarthy were engaged in a personal altercation. Much else is set up in the answer, but for the purposes of this opinion it is unnecessary for us to quote further. The main contention between the parties to this action is raised by the demurrer to the answer, to the effect that the answer does not state facts sufficient to constitute a defense. The contention of the appellant is, that the court erred in sustaining the demurrer; that the averment in the answer that the death of the insured was not accidental, but the result of an intentional injury inflicted by the said Daniel Monahan, was a good defense, and the company were not liable. The contention of the appellee is, that the terms of the policy do not preclude a recovery; that the words "intentional injury inflicted by another person," mentioned in the policy, mean intentional injuries in-

flicted by the said insured, or injuries inflicted intentionally by another person through the procurement or consent of the insured. The exception in the insurance policy upon which appellants rely, heretofore recited, is as follows: "Intentional injuries inflicted by the insured or any other person." If the fact be that this clause precludes a recovery when the injured individual has been killed or injured by the intentional act of another, or in other words, if it precludes the idea that death or injury was the result of accident, then certainly the contention of appellant is correct, and plaintiff cannot recover. Happily we have very recent adjudications covering the construction of the identical clause here under consideration.

In the case of *Travelers Ins. Co.* v. *McConkey*, 127 U. S. 661, decided subsequent to the institution of this particular action, Mr. Justice Harlan, in passing upon this question, said: "The policy expressly provides that no claim shall be made under it, where the death of the insured was caused by intentional injuries inflicted by the insured or any other person. If he was murdered, then his death was caused by intentional injuries inflicted by another person. Nevertheless, the instructions to the jury were so worded as to convey the idea that if the insured was murdered, the plaintiff was entitled to recover; in other words, even if death was caused wholly by intentional injuries inflicted upon the insured by another person, the means used were 'accidental' as to him, and the company was liable. This was error. Upon the whole case, the court is of the opinion that by the terms of the contract the burden of proof was upon the plaintiff, under the limitations we have stated, to show from all the evidence that the death of the insured was caused by external violence and accidental means; also, that no valid claim can be made under the policy, if the insured, either intentionally or when insane, inflicted upon himself the injuries which caused his death, or if his death was caused by intentional injuries inflicted upon him by some other person."

In the case of *Hutchcraft's Ex'r* v. *Travelers Ins. Co.*, 87 Ky. 301, the court, in construing a proviso like the one under consideration in the case before us, says: "The remaining clause stipulates for a further exemption of appellant's liability in the event that intentional injuries are inflicted upon the insured by himself or any other person. It is contended by appellant that the meaning of this clause is, that if the insured intentionally inflicted injuries upon himself, or if any other

person intentionally inflicted injuries upon him with his consent or at his instance, then the appellee should not be liable. A moment's reflection will show that the clause will not admit of this construction. The clause, when placed in juxtaposition with its antecedent, reads as follows: 'No claim shall be made under this ticket when the death may have been caused by intentional injuries inflicted by the insured or by any other person.' This sentence, though awkwardly expressed, is complete, and fairly expresses the idea that if the insured intentionally injures himself by the infliction of bodily wounds from which he dies, he thereby breaks the condition of the policy, or that if he is intentionally injured by any other person by the infliction of bodily wounds from which he dies, the condition of the policy is thereby broken; therefore to add the words 'with his consent,' or 'at his instance,' would have the effect of torturing the meaning of the language used beyond its legitimate import."

We quote thus extensively from these opinions because they clearly and concisely state, perhaps in better language than we are capable of doing, the exact conclusion of our minds with reference to the clause in the policy mentioned in the complaint and answer. We cannot accept the conclusion reached by the court below, or that forced upon our attention by the appellee in the argument. It requires no extended reasoning to illustrate the purpose of the language of the policy referred to in the answer, and relied upon as a defense. There is a vast difference between an intentional injury and an accidental injury. Against accidental and violent injuries the policy provided, but there it stopped; and the company limited its liability by distinctly specifying that when injury or death resulted from intentional injuries inflicted by another, they were duly excepted from the operation of the policy. It is averred in the answer that the death of the insured resulted from the intentional act of the said Daniel Monahan. This we think was quite sufficient to maintain the contention of the defendant; that is, that the answer was a complete and absolute defense to the cause of action stated in the complaint. The demurrer to the answer should have been overruled. We are of the opinion that the judgment of the court below should be reversed, and the caused remanded for further proceedings.

REED, C., and BISSELL, C., concurred.

Per CURIAM. For the reasons stated in the foregoing opinion, the judgment of the court below is reversed.

ACCIDENT INSURANCE — CONDITIONS AGAINST INTENTIONAL INJURIES INFLICTED BY OTHERS. — A condition in an accident insurance policy that no claim shall be made under a policy when death or injury is caused by intentional injuries inflicted by the assured or any other person bars a recovery where the assured is waylaid and assassinated: *Hutchcraft* v. *Travelers Ins. Co.*, 87 Ky. 300; 12 Am. St. Rep. 484, and note. But see *Utter* v. *Travelers Ins. Co.*, 65 Mich. 545; 8 Am. St. Rep. 913.

MULLIN v. PEOPLE.

[15 COLORADO, 437.]

CONTEMPT — FOUNDATION FOR. — A verified information may properly be allowed to perform the office of the affidavit made necessary by statute as the foundation of a proceeding for constructive contempt.

CONTEMPT — JURISDICTIONAL FACTS. — When an affidavit is presented as the basis for a proceeding for contempt, the court must, in the first instance, examine the same, and if the facts presented do not show that a contempt has been committed, the court is without jurisdiction to proceed; if, however, the facts are sufficient, the court may take jurisdiction, and its subsequent orders will not be reviewed for mere error.

CONTEMPT. — PETITION FOR CHANGE OF VENUE may allege matter not *per se* contemptuous, without subjecting the petitioner to punishment for contempt.

INFORMATION for contempt. The alleged contempt of which plaintiff in error was found guilty consisted in making and filing a petition for a change of venue, in which it was stated that "your petitioner fears that he will not receive a fair trial in this court, on account that the judge is prejudiced in favor of the plaintiff herein; and for reason for said fears he says that at a prior term of this court, when the above-entitled action and another action pending in this court, and before the judge hereof, wherein the above-named plaintiff was plaintiff and the above-named defendant and others, of which your petitioner was one, were defendants, were about to be called for trial, the wife of the judge of this court was at the residence of your petitioner, and in excuse for her short visit to your petitioner herein said, in substance, and in presence of your petitioner and his wife, that she must go and see the judge, and arrange with him to have Mrs. Davis (meaning plaintiff herein) to win her case; that at said time, as petitioner was informed, the judge of this court and his wife were boarding in the house and the guests of Mr. and Mrs. Davis.

Your petitioner further says that immediately thereafter he informed his attorneys of the foregoing facts, and requested them to make an application for a change of venue, but was advised by them to allow the judge to try one of said causes, and it could then be ascertained whether the judge was in any manner prejudiced in favor of the plaintiff herein. Your petitioner further says that one of said causes was tried by this court, and that Mrs. Davis did win her said cause; and your petitioner believes that from the rulings of said court and the instructions of the court to the jury in said cause, this court is prejudiced in favor of plaintiff herein. Wherefore he prays that the venue in this action be changed."

Thomas and Thomas, and Alexander Gullett, for the plaintiff in error.

H. M. Hogg, district attorney, and Alvin Marsh, attorney-general, for the people.

HAYT, J. As the information in this case is verified, it may properly be allowed to perform the office of the affidavit made necessary by the statute as the foundation of a proceeding for constructive contempt. The record shows that the petition for a change of venue was presented in a respectful manner; that in fact it was not read to the court, but was handed to the presiding judge for his perusal; and that there was nothing in the petition itself that was regarded, or that could properly have been regarded, as contemptuous. If, therefore, any contempt was committed, it was constructive rather than direct. This was determined in the cause of *Thomas* v. *People*, 14 Col. 254.

We will therefore inquire as to whether or not the facts alleged in the verified information are sufficient to constitute a constructive contempt of court. If the facts charged do not show affirmatively that a contempt has been committed, the judgment of the district court against the plaintiff in error must be reversed.

In the case of *Cooper* v. *People*, 13 Col. 337, it was said: "When an affidavit is presented as the basis of a proceeding for contempt, the court must, in the first instance, examine the same, and if the facts presented do not show that a contempt has been committed, the court will be without jurisdiction to proceed; but if the facts are sufficient, the court may take jurisdiction, and its subsequent orders will not be reviewed for mere error."

In the case at bar, we must assume that the statement set forth in the verified petition for a change of venue as having been made by the wife of the presiding judge was in fact so made, for the reason that in the affidavit or information filed it is not denied that such language was used by her. In some jurisdictions, when a change of venue is asked on account of the prejudice of the presiding judge, it is not necessary to set forth in the petition the fact or facts on which the party bases his fears that he will not receive a fair trial in the court wherein the cause is pending. But in this state such facts must be stated, although with not the same particularity as is required in cases in which the application is based upon the alleged prejudice of the inhabitants of the county: *Hughes* v. *People*, 5 Col. 436.

Assuming, then, for the purposes of this case, that the wife of the presiding judge made the statement attributed to her, plaintiff in error had the undoubted right to embody such statement in his petition for a change of venue without subjecting himself to being punished for contempt. The principal ground relied upon to sustain the action of the court below therefore fails. Had it been charged that the affidavit was false in this respect, and that such false statements were made willfully and maliciously, as argued, a different case would have been presented.

It is alleged, however, that the charge contained in the following language is false: "That at said time, as petitioner was informed, the judge of this court, and his wife, were boarding at the house, and the guests of Mr. and Mrs. Davis." Issue upon this statement seems to have been taken upon the time only, and does not deny that plaintiff in error had received information as stated in his affidavit. The judgment cannot, therefore, rest upon this charge.

The only remaining matter contained in said information necessary to be considered is as follows, to wit: "That the charge contained in and written upon said petition for a change of venue and herein set out, to wit, 'and your petitioner believes that from the rulings of said court, and the instructions of the court to the jury in said cause, this court is prejudiced in favor of the plaintiff herein,' is and was made without any foundation in fact for such belief."

On account of the rulings and instructions in the cause previously tried, the plaintiff in error may have concluded

that the judge was prejudiced against him, and yet the rulings may have been correct, and the instructions proper.

As we have seen, this language is not *per se* contemptuous, and there is no charge made in the information going to show that plaintiff's conduct was not consistent with his entire innocence of evil intent. We must therefore conclude that no contempt is charged in the information. It should therefore have been quashed upon plaintiff's motion.

It is probable that, if the district court had refused to grant the petition for a change of the place of trial of the case of *Davis* v. *Bowman*, its judgment would not have been disturbed upon appeal. And yet we cannot say from anything charged in this information that plaintiff in error had not the right to present his petition to the district court, and obtain its judgment thereon. We can readily see why a judge, who had enjoyed a long and honorable career upon the bench, might feel that the charge that he could be influenced by the matters set forth in the affidavit was wholly unwarranted; and yet, in our opinion, the facts stated in the information, if true, will not sustain the judgment for contempt. The judgment will therefore be reversed, and the cause remanded.

CONTEMPT, RELIEF BY PARTY CONVICTED OF — APPEAL OR WRIT OF ERROR. — It may be stated as a general rule supported by the great weight of authority that an adjudication of contempt by a court of competent jurisdiction is final, and cannot be reviewed by appeal or writ of error, in the absence of a statute giving such method of relief. This is the rule as established at an early date by the supreme court of the United States in the case of *Ex parte Kearney*, 7 Wheat. 38, and subsequently followed in *McMicken* v. *Perin*, 20 How. 133, *New Orleans* v. *Steamship Company*, 20 Wall. 387, and lately affirmed in *Hayes* v. *Fischer*, 102 U. S. 121. The decisions of a number of the state courts are to the same effect. Among them are *Tyler* v. *Hammersley*, 44 Conn. 393; 26 Am. Rep. 471; *State* v. *Woodfin*, 5 Ired. 199; 42 Am. Dec. 161; *Vilas* v. *Burton*, 27 Vt. 56; *Ex parte Summers*, 5 Ired. 149; *State* v. *Thurmond*, 37 Tex. 340; *Teller* v. *People*, 7 Col. 451; *Phillips* v. *Welch*, 12 Nev. 158; *Tyler* v. *Connolly*, 65 Cal. 28; *Sanchez* v. *Newman*, 70 Cal. 210; *Larrabee* v. *Selby*, 52 Cal. 506; *Wyatt* v. *Mayee*, 3 Ala. 94; *Easton* v. *State*, 39 Ala. 551; 87 Am. Dec. 49; *Cossart* v. *State*, 14 Ark. 538; *Bunch* v. *State*, 14 Ark. 544; *Kennedle* v. *Cason*, 25 Ind. 362; *Hunter* v. *State*, 6 Ind. 423; *Lockwood* v. *State*, 1 Ind. 161; *Watson* v. *Williams*, 36 Miss. 331; *Shattuck* v. *State*, 51 Miss. 50; 24 Am. Rep. 624; *Phillips* v. *Welch*, 11 Nev. 187; *State* v. *Galloway*, 5 Cold. 326; 98 Am. Dec. 404; *Ex parte Martin*, 5 Yerg. 149; *In re Cooper*, 32 Vt. 253; *State* v. *Towle*, 42 N. H. 540; *Floyd* v. *State*, 7 Tex. 215; *Crow* v. *State*, 24 Tex. 12; *Casey* v. *State*, 25 Tex. 381; *State* v. *Giles*, 10 Wis. 101; *Dunham* v. *State*, 6 Iowa, 245.

As illustrations of the rule it may be stated that an appeal will not lie from an order of the probate court imprisoning an administrator for contempt in

refusing to obey a peremptory mandate to file an account within a certain time: *State* v. *Judge Parish Court*, 31 La. Ann. 116.

Where a witness is committed until he shall answer certain questions, and he subsequently purges himself of the contempt to the satisfaction of the court, but is remanded, an appeal will not lie: *Jordan* v. *State*, 14 Tex. 436. So a criminal contempt is a specific, substantive, and distinct criminal offense, and judgment of conviction, if within the jurisdiction of the inferior court, is final and conclusive: *Phillips* v. *Welch*, 12 Nev. 158. And a judgment of a court of record imposing a punishment for contempt, declared by the record to have been committed in open court, cannot be revised either by appeal or by *certiorari*: *State* v. *Woodfin*, 5 Ired. 199; 42 Am. Dec. 161; *State* v. *Mott*, 4 Jones, 449. An appeal does not lie from a judgment imposing a penalty for contempt committed in the presence of the court, or so near as to interfere with its business: *In re Daves*, 81 N. C. 72.

In some jurisdictions, judgments for contempt may be reviewed on error in the supreme court in the same manner as in other criminal cases: *Gandy* v. *State*, 13 Neb. 445; *Cooper* v. *People*, 13 Col. 337, 373; *Beck* v. *State*, 72 Ind. 250; *Ruhl* v. *Ruhl*, 24 W. Va. 279; *Myers* v. *State*, 46 Ohio St. 473; 15 Am. St. Rep. 638; *In re Deaton*, 105 N. C. 59; *In re Cheeseman*, 49 N. J. L. 115; 60 Am. Rep. 596.

Exceptions may be taken on the question of jurisdiction, when it is distinctly raised and passed upon as matter of law: *Androscoggin etc. R. R. Co.* v. *Androscoggin R. R. Co.*, 49 Me. 392; *Snowman* v. *Harford*, 57 Me. 397; *State* v. *Miller*, 23 W. Va. 801. When the question of contempt is tried upon an issue of law tendered by the party moving in the proceeding, and decided upon that issue, a writ of error may be brought: *Tyler* v. *Hammersley*, 44 Conn. 393; 26 Am. Rep. 471. An order of court adjudging a person guilty of contempt, and imposing a fine and costs for violating an injunction is a final order, and therefore appealable: *Romeyn* v. *Caplis*, 17 Mich. 449; *People* v. *Simonson*, 9 Mich. 492. So an order adjudging a defendant in an action for divorce guilty of contempt for the non-payment of alimony is a final order, and appealable: *Haines* v. *Haines*, 35 Mich. 138. But pending an appeal in such case the court below may make a further order for the payment of alimony upon a refusal to pay such alimony as has accrued since the appeal was taken: *Ross* v. *Griffin*, 53 Mich. 5.

In the states in which judgments convicting and punishing parties for contempt are reviewable, decisions of the following purport have been made: Fraud in disposing of a trust fund cannot be punished by judgment for contempt in not obeying an order to pay it over to a receiver. The contempt proceedings can only extend to punishment for contumaciously refusing to obey the order, and an order in such proceeding directing the defendant to be imprisoned until the payment of the money is an appealable order: *Register* v. *State*, 8 Minn. 214; 23 Am. Dec. 499. Final orders punishing a party in remedial proceedings for contempt, such as orders imposing a fine in the nature of an indemnity to a party suffering injury by reason of the alleged contempt, are appealable: *In re Daves*, 81 N. C. 72; *Brinkley* v. *Brinkley*, 47 N. Y. 40; *Witter* v. *Lyon*, 34 Wis. 564; *McCredie* v. *Senior*, 4 Paige, 378; *Handhausen* v. *United States Marine etc. Ins. Co.*, 5 Heisk. 702. The rule is often applied in cases of violations of injunctions: *People* v. *Sturtevant*, 9 N. Y. 363; 59 Am. Dec. 536; *People* v. *Spaulding*, 10 Paige, 284; 7 Hill, 301; *Watrous* v. *Kearney*, 79 N. Y. 496; *People* v. *Dwyer*, 90 N. Y. 402. So final orders and judgments in contempt proceedings in criminal cases are sometimes appealable: *Whittem* v. *State*, 36 Ind. 196; *Ex parte Wright*, 65 Ind. 504;

Bickley v. *Commonwealth*, 2 J. J. Marsh. 572; *Turner* v. *Commonwealth*, 2 Met. (Ky.) 619; *Hundhausen* v. *Insurance Co.*, 5 Heisk. 702; *Ex parte Robbins*, 63 N. C. 309; *In re Walker*, 82 N. C. 95; *State* v. *Hunt*, 4 Strob. 322. An appeal will lie from a judgment imposing a fine upon a person for contempt in aiding to obstruct the execution of a decree: *Wells* v. *Commonwealth*, 21 Gratt. 500; and a proceeding for contempt in disobeying an injunction is in the nature of a criminal proceeding, and can generally be reviewed by writ of error: *Baltimore etc. R. R. Co.* v. *Wheeling*, 13 Gratt. 40. Where the costs in a case are ordered taxed against counsel as punishment for a contempt for negligence occurring in another court at a previous time, an appeal may be taken: *Ex parte Robbins*, 63 N. C. 309; and where, at the instance of a party litigant, judgment of imprisonment is rendered against the adverse party for contempt in willfully disobeying an order of court, the latter is entitled to an appeal: *Cromartie* v. *Commissioners*, 85 N. C. 211.

The conclusion is sometimes announced that an order relative to the punishment of a party for contempt is final, and not reviewable on appeal or by writ of error, unless a clear abuse of discretion is shown: *Howard* v. *Durand*, 36 Ga. 346; 91 Am. Dec. 767; *Haines* v. *Haines*, 35 Mich. 138. The extent of punishment inflicted is among these matters of discretion: *People* v. *Sturtevant*, 9 N. Y. 263; 59 Am. Dec. 536. The general tendency of the courts seems to be to limit the scope of investigation upon appeal to a review of errors of law only, and especially to a consideration of the question of jurisdiction, or power of the court below to inflict the punishment. Thus on an appeal from an order of court committing a party for contempt for violating an injunction, the only question to be considered is, whether or not the court had jurisdiction to grant the injunction. The question of whether or not the decision of the court in granting it was right or wrong is not open to consideration: *People* v. *Sturtevant*, 9 N. Y. 263; 59 Am. Dec. 536. The question upon the hearing of a contempt is of fact merely, to be determined on all the evidence by the lower court, and the court on appeal will not disturb such determination, except for errors of law or want of jurisdiction appearing upon the record: *State* v. *McKinnon*, 8 Or. 487. An order punishing for contempt in violating an injunction can only be reviewed upon the merits, or for error on appeal from the order, and it is within the discretion of the lower court to open or vacate such order on motion, and the exercise of this discretion is not subject to review on appeal: *Watrous* v. *Kearney*, 79 N. Y. 496.

On appeal from an order punishing for contempt, the question of the advisability of the court's action cannot be considered. The only question open to review is that of power, and whether or not the act or word punished is in fact a contempt: *In re Prior*, 18 Kan. 72; 26 Am. Rep. 747. On appeal from an order committing a party for contempt for refusing to obey a prior order requiring him to hand over certain property to a receiver, error in such prior order cannot be considered. The only question open to consideration is, whether or not the court had jurisdiction to make such prior order. It is immaterial, as far as condemnation is concerned, whether or not such order was made on sufficient proof: *Tolman* v. *Jones*, 114 Ill. 147. On a review of proceedings to punish an executor for contempt in neglecting to obey a surrogate's decree ordering the payment of money in his hands as executor, the investigation may properly be limited to the questions of service of the decree and the neglect constituting its violation: *In re Snyder*, 103 N. Y. 178. On appeal, the court has no jurisdiction to reverse the order of the lower court for commitment and imprisonment as a punishment for con-

tempt. The court will not retry the question of contempt or no contempt, and has no jurisdiction for that purpose; but it may revise and correct erroneous and illegal sentences or judgments pronounced in contempt proceedings: *Patton* v. *Harris*, 15 B. Mon. 607; *Bickley* v. *Commonwealth*, 2 J. J. Marsh. 572; *Turner* v. *Commonwealth*, 2 Met. (Ky.) 619; *Dobbs* v. *State*, 55 Ga. 272. As a general rule, questions of fact will not be considered on appeal in contempt proceedings, nor the evidence reviewed, unless set out in the record on appeal: *Whittem* v. *State*, 36 Ind. 196; *Beck* v. *State*, 72 Ind. 250.

Some courts seem to exercise the same jurisdiction on appeal from an order in a contempt proceeding as that exercised on appeal in other cases: *Haines* v. *Haines*, 35 Mich. 138; but even where the court will examine the case *de novo* on appeal, the case presented must be the same as was before the lower court. A new application filed originally in the appellate court will not be considered, as where a paper is filed for the first time in the appellate court, in which the appellant alleges that since the appeal was taken he has complied with the order of the lower court: *People* v. *Bergen*, 53 N. Y. 405. Where the judgment or order appealed from in contempt proceedings is erroneous in part and valid in part, the court of appeal may affirm the valid part, reverse the erroneous part, and render such judgment as should have been rendered by the court below: *Haines* v. *Haines*, 35 Mich. 138; *Eads* v. *Brazelton*, 22 Ark. 499; 79 Am. Dec. 88; *Middlebrook* v. *State*, 43 Conn. 257; 21 Am. Rep. 650.

After the judgment of the lower court imposing punishment for contempt of its order has been affirmed by the appellate court, it becomes final, and the inferior court has no power to modify or remit it: *In re Griffin*, 98 N. C. 225.

As to whether or not an appeal in contempt proceedings will act as a *supersedeas*, it was decided in *Whittem* v. *State*, 36 Ind. 196, that all such proceedings are criminal in their nature, and that the right of appeal does not deprive the lower court of the power to inflict immediate and summary punishment for any contempt. The appeal will not stay or supersede the judgment. So it was decided in *Hunt* v. *State*, 4 Strob. 322, that where a contempt is committed in the presence of the court, and the offender is ordered committed to prison at once, or a fine is imposed, with the requirement of immediate payment, the sentence may be executed at once, and an appeal will not supersede the judgment. Still, if no time is fixed for the payment of the fine, the appeal, although not operating as a *supersedeas*, may be considered as suspending proceedings until the hearing of the appeal and its final determination, as by consent of the lower court. The later cases, however, seem to assert the contrary doctrine. Thus where a party is committed to jail for contempt, in refusing to comply with an order of court, the perfecting of an appeal from the order disobeyed will of itself suspend all proceedings under the order of commitment, and there is no necessity to appeal from it: *People* v. *Prendergast*, 117 Ill. 588; and where a stay of proceedings has been granted, pending an appeal from an order adjudging an attorney guilty of contempt, and enjoining him from practicing in that court until purged of the contempt, he is entitled to all former privileges in that court: *Bird* v. *Gilbert*, 40 Kan. 469.

RELIEF BY CERTIORARI. — In some states judgments and sentences for contempt may be reviewed by writ of *certiorari*, while in others the right to this means of review is denied. In the following cases the writ has been allowed for the purpose of bringing the proceedings of the lower court before

the appellate court for review: *Harrison* v. *State*, 35 Ark. 458; *Dunham* v. *State*, 6 Iowa, 245; *State* v. *Myers*, 44 Iowa, 580; *Hummell's Case*, 9 Watts, 416; *Commonwealth* v. *Newton*, 1 Grant Cas. 453; *State* v. *Judges*, 32 La. Ann. 1256; *State* v. *Judge*, 40 La. Ann. 434; *Young* v. *Cannon*, 2 Utah, 560; *People* v. *Kelly*, 24 N. Y. 74.

For the purpose of review by *certiorari*, the proceedings for contempt must be deemed to have been terminated by the entry of the final order convicting the relator of contempt, and sentencing him to pay a fine and be imprisoned, and it is error to quash the writ on the ground that the proceedings were not terminated, as no writ of commitment had issued: *People* v. *Donahue*, 59 How. Pr. 417.

The proper method of bringing before the supreme court for review the order of the lower court punishing an attorney for contempt is by bringing up the record proper of such court by a *certiorari* in the nature of a writ of review: *Ex parte Biggs*, 64 N. C. 202.

In some states, *certiorari* in cases of contempt is employed by the appellate court only to carry out its superintending jurisdiction over the action of the lower court, and the principal function of the writ is to bring up such proceedings when in excess of the jurisdiction of the court below, the writ only reaching such proceedings as are absolutely void for want of jurisdiction. Thus the inquiry on *certiorari* must be confined to the simple question whether or not the lower court exceeded its jurisdiction in making the order complained of: *Maxwell* v. *Rives*, 11 Nev. 213; *Phillips* v. *Welch*, 12 Nev. 158; *Young* v. *Cannon*, 2 Utah, 560. Contempt proceedings cannot be set aside and annulled in a proceeding for *certiorari*, unless the court below has no jurisdiction to make the order disobeyed: *State* v. *Monroe*, 41 La. Ann. 314. In such case, the proceedings of the lower court will not be interfered with when such court had jurisdiction, properly exercised its judicial power, and the disobedience of its order was punishable as a contempt. The supreme court has no concern with the question whether the act charged was or was not committed, and will not review the facts on which the lower court acted in punishing for contempt: *State* v. *Judge*, 40 La. Ann. 434. If a probate court has jurisdiction, its judgment upon the issues in proceedings for contempt is final, and a review under a writ of *certiorari* extends only to the question whether or not such court regularly pursued its authority: *Ex parte Smith*, 53 Cal. 204. When, upon a proceeding against a party for contempt, the defense is a prior adjudication of the same matter, and the court adjudges the party guilty, such defense does not go to the jurisdiction of the court, and its ruling will not be reviewed on *certiorari*: *Muir* v. *Superior Court*, 58 Cal. 361. The jurisdiction of a court to adjudge a contempt committed out of its presence does not depend upon the form of the affidavit which sets the proceeding in motion. When the order to show cause is served, the defendant can appear and answer the allegations against him. The commitment is not based on the affidavits, but upon evidence introduced on the return day of the order to show cause, and a finding that a contempt was committed will not be reviewed on *certiorari*: *Golden Gate etc. Co.* v. *Superior Court*, 65 Cal. 187.

On the other hand, the writ of *certiorari* in cases of contempt is sometimes made to effect the same purpose as a writ of error, bringing up for reexamination not only the question of jurisdiction, but also conferring power upon the appellate court to reverse or correct the judgment of the court below for any errors of law appearing. This is the doctrine announced in *Ex parte Biggs*, 64 N. C. 202; *Commonwealth* v. *Newton*, 1 Grant Cas. 453; *Dun-*

ham v. *State*, 6 Iowa, 245. It has been decided that the supreme court may reverse the judgment of the court below in proceedings for contempt, where by writ of *certiorari* a clear abuse of discretion is shown: *Harrison* v. *State*, 35 Ark. 458.

The refusal of a witness to answer proper questions before a grand jury is punishable as a contempt committed in a proceeding upon an indictment, and the appellate court before which the propriety of a commitment for contempt in refusing to answer questions before a grand jury is brought by *certiorari* is bound to discharge the party convicted, when the act charged as contumacious is necessarily innocent and justifiable, or where it is the mere assertion of a constitutional right: *People* v. *Kelly*, 24 N. Y. 74.

RELIEF BY HABEAS CORPUS. — A writ of *habeas corpus* is a collateral remedy; and as the judgment of a court of competent jurisdiction upon a matter within its jurisdiction cannot be collaterally impeached, it naturally follows that in contempt proceedings, no question of jurisdiction being raised or involved, a conviction or commitment for contempt cannot be reviewed by means of this writ. It is consequently settled by an overwhelming weight of authority that where a court has jurisdiction of the person of the defendant, and of the subject-matter out of which the alleged contempt arises, he is not entitled to relief by means of this writ. It cannot be employed to bring up for review any of the facts of the case or errors of law committed at the trial.

The rule in contempt proceedings is, that the functions of the writ of *habeas corpus*, when the party who has appealed to its aid is in custody under process, do not extend beyond an inquiry into the jurisdiction of the court by which the commitment for contempt was issued, and the validity of the process upon its face: *Ex parte Cohn*, 55 Cal. 193; *Ex parte Perkins*, 18 Cal. 60; *Ex parte McCullough*, 35 Cal. 97; *Ex parte Kearney*, 7 Wheat. 38; *Ex parte Maulsby*, 13 Md. 625; *People* v. *Pirfenbrink*, 96 Ill. 68; *Ex parte Adams*, 25 Miss. 883; *Shattuck* v. *State*, 51 Miss. 50; 24 Am. Rep. 624; *Ex parte Sternes*, 77 Cal. 156; 11 Am. St. Rep. 251; *Bickley* v. *Commonwealth*, 2 J. J. Marsh. 575; *Robb* v. *McDonald*, 29 Iowa, 330; 4 Am. Rep. 211; *In re Perry*, 30 Wis. 268; *State* v. *Fagin*, 28 La. Ann. 887; *In re Wood*, 30 La. Ann. 672; *Ex parte Sam*, 51 Ala. 34; *Burnham* v. *Morrissey*, 14 Gray, 226; 74 Am. Dec. 676; *Ex parte Wimberly*, 57 Miss. 437; *Ex parte Goodin*, 67 Mo. 637; *Ex parte Winston*, 9 Nev. 71; *Phillips* v. *Welch*, 12 Nev. 158; *State* v. *Towle*, 42 N. H. 540; *People* v. *Jacobs*, 66 N. Y. 8; *In re Stokes*, 5 S. C. 71; *State* v. *Galloway*, 5 Cold. 326; 98 Am. Dec. 404; *Jordan* v. *State*, 14 Tex. 436; *Holman* v. *Mayor*, 34 Tex. 668; *Vilas* v. *Burton*, 27 Vt. 61; *In re Williamson*, 26 Pa. St. 9; 67 Am. Dec. 374; *In re Cooper*, 32 Vt. 253.

In *Ex parte Reed*, 100 U. S. 13, 23, the court said: "A writ of *habeas corpus* cannot be made to perform the function of a writ of error. To warrant the discharge of the petitioner, the sentence under which he is held must be not merely erroneous and voidable, but absolutely void. As was stated before, the court can only examine two questions on *habeas corpus* in cases of commitment for contempt; and these are, — 1. As to the jurisdiction; and 2. As to the form of commitment." In *People* v. *Cassels*, 5 Hill, 164–167, the rule was thus stated: "If there has been error, the remedy is by *certiorari* or writ of error. When the return states the imprisonment to be by virtue of legal process, the officer may inquire whether in truth there be any process, and whether it appears upon its face to be valid; and he may also inquire whether any cause has arisen since the execution for putting an end to the imprisonment, as a pardon, reversal of judgment, payment of fine,

and the like. But he cannot rejudge the judgment of the committing court or magistrate." In this case it was decided that as the return to the *habeas corpus* showed that the prisoner was detained under a commitment for contempt in refusing to answer questions as a witness in a criminal complaint, the officer before whom the writ was returnable could not inquire as to the truth of the facts adjudged by the committing magistrate, nor whether the questions put to the witness were proper, nor whether he was privileged from answering. The regularity of a commitment for contempt in refusing to pay alimony will not be reviewed on an application for a writ of *habeas corpus*, if it was regular on its face: *In re Bissell*, 40 Mich. 63. Upon an application for discharge upon the writ, by an executor who is in custody under an order of court adjudging him guilty in refusing to pay over money under a decree of distribution, if the court had jurisdiction and the proceedings are regular and valid on their face, the prisoner is not entitled to a discharge: *Ex parte Cohn*, 55 Cal. 193. The foregoing cases seem to settle the question that where courts are of co-ordinate jurisdiction, the writ will issue from one to inquire into the jurisdiction of the other, although some cases take the ground that one court should not judge the jurisdiction of another tribunal of co-ordinate jurisdiction and dignity: *Shattuck* v. *State*, 51 Miss. 50; 24 Am. Rep. 624; *In re Williamson*, 26 Pa. St. 9; 67 Am. Dec. 374; *Ex parte Kearney*, 7 Wheat. 38; while one case is found to sustain the view that a court of inferior authority may issue the writ for the purpose of considering the jurisdiction of a court of superior jurisdiction: *Ex parte Jilz*, 64 Mo. 205; 27 Am. Rep. 218. This case, however, is undoubtedly open to severe criticism. When, however, the jurisdiction of the committing court is undoubted, and the commitment is sufficient and regular in form, the prisoner must be remanded and the writ discharged: *People* v. *Sheriff*, 29 Barb. 622; *In re Percy*, 2 Daly, 530. Where items of cost and expenses are included in the fine, which are improperly allowed, this is not an excess of jurisdiction so as to render the commitment void on *habeas corpus: People* v. *Jacobs*, 66 N. Y. 8. The affidavits in support of an attachment cannot be inquired into, as the court hearing the *habeas corpus* cannot inspect or revise the evidence upon which the committing court acted, to ascertain if it is sufficient to sustain the judgment. Errors committed by the committing court as to the force and effect of the evidence on which it found its judgment are not subject to revision upon proceedings under the writ: *State* v. *Galloway*, 5 Cold. 326; *In re Smethurst*, 2 Sand. 724. Where a return shows a good cause of commitment, it is valid, though defective in form: *State* v. *White*, T. U. P. Charlt. 136; because a party committed will not be discharged for mere irregularity in the proceedings under which he was committed, if the officer had jurisdiction: *In re Perry*, 30 Wis. 268. One committed for contempt in refusing to serve as a juror is not entitled to be released on the writ, notwithstanding the order of commitment shows upon its face that he is exempt by law from jury duty, and has claimed his exemption: *Ex parte Goodin*, 67 Mo. 637. A husband committed for contempt in refusing to pay alimony is not entitled to his discharge on *habeas corpus* on showing that since his commitment he has filed his petition in insolvency, and has obtained a preliminary order declaring him an insolvent: *Ex parte Wilson*, 73 Cal. 97.

A party committed for contempt in not answering questions as a witness will be released under the writ, upon abatement of the action: *Ex parte Rowe*, 7 Cal. 175. Or where commitment is until appearance before the grand jury, the prisoner will be discharged upon the writ on the discharge of the jury: *Ex parte Maulsby*, 13 Md. 625.

When the return to the writ does not show that there has been a judgment or conviction of contempt against the prisoner, he will be discharged: *Ex parte Adams*, 25 Miss. 883; 59 Am. Dec. 234. Where the commitment mentions no definite term of imprisonment, the prisoner will be discharged: *In re Hammel*, 9 R. I. 248. Thus where an executor is committed for contempt in failing to obey an order of court to pay a widow a certain sum per month until he obeys such order or is discharged by due course of law, he is entitled to be discharged on *habeas corpus: In re Leach*, 51 Vt. 630; *People* v. *Pirfenbrink*, 96 Ill. 68. Where a court commits one for contempt, and the order does not state the facts constituting the contempt, the decision cannot be reversed on *habeas corpus;* but if the facts are stated, the party may be released under the writ, if such facts do not show a contempt: *Ex parte Summers*, 5 Ired. 149.

The taking of the deposition of a party in a pending case, merely to find out what his evidence will be, and to annoy and oppress him, with no intention of using the deposition as evidence, is an abuse of judicial process, and a party committed by a notary public for contempt in refusing to give his deposition in such a case will be released on *habeas corpus: In re Davis*, 38 Kan. 408. In case of a prisoner charged with contempt in refusing to answer questions asked by a notary in taking a deposition, and brought up under the writ, there is no presumption of jurisdiction in favor of the notary, and no adjudication of jurisdictional facts which the court must respect; but it must examine whether the commitment is within the meaning and spirit as well as within the letter of the law. A notary has no arbitrary power to compel a witness to answer incompetent, irrelevant, and inadmissible questions asked merely for discovery, and a refusal to answer such questions is not a contempt. A notary can commit for contempt only when he has exercised his functions formally and substantially as contemplated by the statute; otherwise one committed for contempt by him is entitled to be released on *habeas corpus: Ex parte Krieger*, 7 Mo. App. 367.

In several cases the national courts have laid down the law to be, that where it appears by the return to a writ issued by a state court that the petitioner is held by authority, or color of authority, from the United States, the state tribunal or officer issuing the writ cannot proceed further, but must remand the prisoner. The question whether or not such authority is valid cannot be examined by the state court, as this question is within the exclusive jurisdiction of the national courts: *In re Farrand*, 1 Abb. 140; *Ableman* v. *Booth*, 21 How. 506; *United States* v. *Booth*, 21 How. 506; *In re Tarble*, 13 Wall. 397; *Ex parte Smith*, 3 McLean, 129.

In a recent case of interstate extradition, however, the facts were, that one Robb, the agent of the state of Oregon held the prisoner under arrest in obedience to a requisition from the governor of that state upon the governor of California. A state court of the latter state ordered him to appear with his prisoner on *habeas corpus*, and show upon what grounds he held him. He claimed by his return to the writ that he held the prisoner by force of the United States constitution, and therefore was not answerable to the jurisdiction of the state court, and hence refused to obey the writ. He was committed for contempt, and the state supreme court affirmed the judgment. On error to the United States circuit court it was decided, upon the authorities above cited, that the committal was unauthorized and void: See *In re Robb*, 19 Fed. Rep. 26; but on error to the supreme court of the United States from the judgment of the state court committing Robb for contempt, that judgment was sustained, and the decision of the circuit court overruled. The supreme

court of the United States, after distinguishing the cases cited, decided that an agent appointed by a state in which a fugitive from justice stands charged with crime, to receive him from the state by which he is surrendered, is not an officer of the United States within the meaning of the former decisions of that court; that the national courts are not invested with exclusive jurisdiction to issue writs of *habeas corpus* in proceedings for the arrest of fugitives from justice, and their delivery to the authorities of the state in which they stand charged with crime; and that, subject to the exclusive jurisdiction of the federal courts to determine whether or not persons held in custody by authority of such courts, or by federal officers acting under federal laws, are so held in conformity to law, the states have the right, by their judicial tribunals, to inquire into the grounds upon which any person within their limits is restrained of his liberty, and to discharge him when it is ascertained that his restraint is illegal, notwithstanding such illegality may arise from a violation of the federal constitution or laws: *Robb* v. *Connolly*, 111 U. S. 624.

OTHER MEANS OF RELIEF. — An injunction will not lie to prevent the carrying out of a judgment for contempt: *Sanders* v. *Metcalf*, 1 Tenn. 419. Nor will writs of *mandamus* or prohibition be issued, as a general rule, to a court of general jurisdiction, on the petition of a person committed for contempt of that court. *Habeas corpus* or *certiorari* is the proper remedy: *Ex parte Stickney*, 40 Ala. 160; *Ex parte Biggs*, 64 N. C. 202; *People* v. *Turner*, 1 Cal. 152. The supreme court of the United States has decided, however, that *mandamus* may be issued by that court to an inferior court to restore an attorney at law disbarred by the latter court when it had no jurisdiction in the matter, for a contempt committed by him before another court: *Ex parte Bradley*, 7 Wall. 364.

One committed for contempt by a court of general jurisdiction has no right of action for trespass for the imprisonment against the judge thereof, even though he was acting in excess of his jurisdiction and actuated by malicious motives, and the prisoner has been released by *habeas corpus* or otherwise. This doctrine is maintained under the rule that superior courts of general jurisdiction are not liable to answer personally for acts done by them in a judicial capacity, or for errors of judgment: *Yates* v. *Lansing*, 5 Johns. 282; *Lange* v. *Benedict*, 73 N. Y. 12; 29 Am. Rep. 80; *Bradley* v. *Fisher*, 13 Wall. 335. Where, however, a court acts without any jurisdiction at all, the judge thereof may be held liable in a civil action for false imprisonment. Thus a judge of an inferior court, acting in a case of which he has no jurisdiction, or exceeding his jurisdiction, in committing a party for contempt is liable in damages to the party imprisoned: *Piper* v. *Pearson*, 2 Gray, 120; 61 Am. Dec. 438; *Clarke* v. *May*, 2 Gray, 410; 61 Am. Dec. 470; *Newton* v. *Locklin*, 77 Ill. 103. The same rule applies to a notary who commits a witness for contempt while taking a deposition: *Ex parte Kreiger*, 7 Mo. App. 367. An officer does not, however, by executing a process of commitment issued without jurisdiction, subject himself to an action for false imprisonment, unless want of jurisdiction appears on the face of the process: *Clarke* v. *May*, 2 Gray, 410; 61 Am. Dec. 470; *Hallock* v. *Dominy*, 69 N. Y. 238; *Anderson* v. *Dunn*, 6 Wheat. 204.

A person imprisoned for contempt must be released under a pardon granted by the pardoning power: *State* v. *Sauvinet*, 24 La. Ann. 119; 13 Am. Rep. 115; *Ex parte Mullee*, 7 Blatchf. 24.

In cases of criminal contempts, where fine or imprisonment is imposed merely as punishment, the contemnor may, by promptly submitting himself

have been several times cited and approved by this court. It is not necessary to restate the doctrine therein announced.

Counsel for appellants in the court below undertook to avoid the force and effect of these decisions by the offer of evidence tending to show that the plaintiff permitted her husband, Thomas McGerr, to deal with the property in controversy as his own, and so to obtain credit upon it. They also requested the court to charge the jury to the effect that even if the property in controversy was the separate property of the wife, she could not recover damages for its conversion if she had allowed it to be used by her husband as a means of obtaining credit for the goods for the price of which it was seized and sold. This instruction was refused.

Much reliance is placed upon the following paragraph from the opinion in *Coon* v. *Rigden*, 4 Col. 275: —

"Should the wife permit the husband to deal with and sell her separate property as his own, or obtain credit upon it as his own, undoubtedly this would be a fraud against which courts would extend their protection."

Unquestionably, a married woman may, by her own voluntary conduct, forfeit protection to her separate estate. Being *sui juris*, she is responsible for her own fraudulent acts, as well as subject to the law of estoppel: *Colorado etc. R'y Co.* v. *Allen*, 13 Col. 229. Some of the instructions prayed by defendants, and refused by the court, undoubtedly state correct propositions of law relating to such conduct. But the evidence tending to show that Mrs. McGerr permitted her husband to deal with the property in controversy as his own was not very strong, though probably sufficient to make it incumbent upon the court to give the instructions prayed upon that theory, if the issues in the case had been properly framed for that purpose.

The foregoing quotation from *Coon* v. *Rigden*, 4 Col. 275, indicates that the acts of a wife which would cause her property to become liable for the debts of her husband must be such as would amount to a fraud, and thus estop her from asserting her title. "The ground of an estoppel by conduct commonly is fraud," says Mr. Bigelow, at page 686 of his work on that subject. It is a general rule that matters constituting fraud must be specially pleaded, in order to be available as a defense.

As this difficulty in the case had not been noticed by counsel in their original printed briefs, nor in the oral argument

before the court upon the rehearing, we requested counsel to present additional briefs, which they have done, upon the following question: "Were defendants below entitled to have the jury instructed upon the theory that the property in controversy had become subject to the debts of Thomas McGerr by reason of plaintiff's supposed fraudulent conduct in respect thereto, without setting forth in their answer any defense of that character?"

Counsel for appellants now contend that it is unnecessary to plead specially those matters which amount to an estoppel *in pais;* that such matters may be given in evidence under the general issue; and that inasmuch as there was some evidence tending to show that plaintiff permitted her husband to deal with the property as his own, the question whether such evidence was sufficient to estop plaintiff from asserting her title should have been submitted to the jury. This view is supported by respectable common-law authorities: Bigelow on Estoppel, 669; *Welland Canal Co.* v. *Hathaway*, 8 Wend. 480; 24 Am. Dec. 51. But whatever may be the weight of common-law precedents upon this subject, reason, logic, and the general current of authority in the code states concur in the rule that estoppels must be specially pleaded, and this rule includes estoppels *in pais*, as by fraudulent conduct and the like.

Section 56 of the code of Colorado provides: "The answer of the defendant shall contain,—1. A general or specific denial," etc.; "2. A statement of any new matter constituting a defense," etc.

Commenting upon this section of the code, Dr. Bliss, in his excellent work on code pleading, section 329, says: "Fraud as a defense is sustained by affirmative facts which do not contradict, but avoid the legal effect of, the facts stated by the plaintiff."

Again, at section 330, it is said: "Keeping in view the logical rule that the new facts which may be proved under a denial are those which show that the plaintiff's statements are untrue, also that facts which are consistent with their truth, but show that he has no cause of action, are new matter to be pleaded, we can seldom be deceived as to what may and may not be thus proved. It is held in most of the states that facts showing fraud as a defense, especially in acquiring title to the property claimed by the plaintiff, which title would be good but for the fraud, are new matter, to be specially pleaded."

Again, at section 339, it is said: "A statement of new matter constituting a defense is but a statement of facts which do not appear in the plaintiff's pleading, and which show that, notwithstanding the facts stated by him, he suffers no wrong."

Again, in section 364, the same author adds: "Matter of estoppel is equitable in its nature, yet, as forbidding a party to plead the truth, it should be set out with more certainty than will avail in ordinary defenses." With this section the author concludes the chapter upon the defense of new matter with the pertinent observation: "It is unnecessary in this connection to attempt to instance all the defenses which should be specially pleaded. In treating upon common-law pleading it might be necessary, inasmuch as the *allegata* bear so slight a relation to the *probata* that the pleader cannot decide, upon principle, what should be specially pleaded, and what is provable under the general issue. But the rules given and illustrated in this and the last chapter will not permit a careful code pleader to made a mistake in this regard."

Dr. Pomeroy, in his valuable treatise on Remedies and Remedial Rights by the Civil Action, According to the Reformed American Procedure, at section 712, says: "According to the decided weight of authority, an estoppel *in pais* cannot be proved under a general denial, but is new matter": *Wood* v. *Ostram*, 29 Ind. 186; *Dale* v. *Turner*, 34 Mich. 417; *Ransom* v. *Stanberry*, 22 Iowa, 334; *Warder* v. *Baldwin*, 51 Wis. 450; *Clarke* v. *Huber*, 25 Cal. 597; *Bray* v. *Marshall*, 75 Mo. 327; *Maxwell* v. *Longenecker*, 89 Ill. 102.

In *Birch* v. *Steppler*, 11 Col. 400, the answer contained a defense involving estoppel by conduct, which was specially and successfully pleaded against the assertion of title to real estate.

In order to make correct application of the foregoing doctrine to the question before us, it becomes necessary to consider further the state of the pleadings in the case.

The complaint is similar to an ordinary declaration in trover at common law. The answer denies, — 1. The plaintiff's ownership or possession of the property; 2. The value of the property; 3. The wrongful taking; and lastly, pleads the judgment in favor of Bullock and Strickler against Thomas McGerr, the issuance of execution thereon, the levy by the sheriff upon the property in controversy "as the property of the said Thomas McGerr," and further alleges "that said goods or cattle were at the time of the levy under said writ

in the possession of said Thomas McGerr, and were the property of said Thomas," etc. Nothing whatever of fraud, fraudulent conduct, or conduct on the part of plaintiff calculated to mislead any one as to the title is in any manner alleged.

In this connection, the case of *Tucker* v. *Parks*, 7 Col. 70, is directly in point, where it is said: "Fraud must be specially pleaded in an answer as well as in a complaint." The language of that opinion is, in substance, pertinent to the record before us. Neither fraud nor any other matter in avoidance of plaintiff's title is set up in the answer; nor are any facts stated in the answer apprising the plaintiff that her title to the property in controversy would be assailed on the ground of fraud. Hence defendants could not avail themselves of such a defense by evidence; and since not by evidence, then not by instructions relating to such evidence.

The evidence tending to show how the husband dealt with the property, to the extent the plaintiff had knowledge thereof, was admissible, and was received and submitted to the jury as tending to elucidate the question presented by the pleadings, to wit: Was the property in fact the property of the plaintiff? or was it the property of Thomas McGerr, her husband? Unless the evidence reached far enough to overcome or equal plaintiff's evidence, based upon her affirmative allegation that she was the owner of the property, she was, under the pleadings, entitled to a verdict. The jury evidently considered that the preponderance of the evidence upon this issue was in favor of the plaintiff's title.

It has been suggested that the case of *Benesch* v. *Waggner*, 12 Col. 534, 13 Am. St. Rep. 254, is in conflict with the case of *Tucker* v. *Parks*, 7 Col. 70, in reference to the necessity of pleading fraud in actions like the case now before us. Nothing, however, in either case conflicts with the principle we have found applicable to such pleadings, and which may be stated thus: Where the defendant's claim of title springs out of or rests upon the alleged fraud or fraudulent conduct of the plaintiff, so that but for the fraud the title of plaintiff would be good, such fraud, being the source and foundation of the defendant's claim, is essentially new matter, and must be pleaded or it cannot be proved.

In the Benesch-Waggner case, the plaintiff was the original owner of the property; he did not claim ownership on the ground of the fraud of the opposite party, but in spite of it.

Hence it was held that a general allegation of ownership was sufficient, and that there was no necessity for setting forth in the complaint the supposed fraudulent matter incidentally involved in the controversy.

In the Tucker-Parks case, also, the plaintiff claimed title by assignment from the original owners, and the allegations of the complaint were general. But the defendant sheriff who sought to justify the taking of the property in execution against the original owners, on the ground that the deed of assignment to the plaintiff was fraudulent, was not allowed to give evidence of the fraud, for the reason that the fraudulent character of the deed of assignment was essential to the validity of his levy, and so was new matter, the existence of which he must both allege and prove, and his answer contained no charge or allegation of that character.

In the case now before us, if the property in controversy was indeed the property of plaintiff, then the right of defendants, if they had such right, to levy upon the same for her husband's debts, must have sprung out of and rested upon fraudulent conduct on the part of plaintiff in respect to the property. Such fraudulent conduct, if it had any existence, was new matter, essential to be alleged and proved by defendants in order to sustain their levy. There being no issue of that character, the court properly refused to give instructions based upon such a theory.

The defendants tendered the issue that the property in controversy was not the property of plaintiff, but of her husband. By the instructions prayed and refused, as above stated, they sought to try quite a different issue, to wit, that the property, though the property of the plaintiff, had become subject to the debts of her husband by reason of her fraudulent conduct. The trial court did not err in refusing to allow defendants to tender one issue and recover upon another. The verdict of the jury upon the issue as tendered and accepted was well sustained by the evidence, and cannot properly be disturbed. The judgment of the district court will stand affirmed, for the reasons stated in this opinion.

HUSBAND AND WIFE — SEPARATE PROPERTY — HUSBAND'S DEBTS. — The wife's separate property is not subject to her husband's debts: *Evans* v. *Welborn*, 74 Tex. 530; 15 Am. St. Rep. 858, and note; *Storrs* v. *Storrs*, 23 Fla. 274; *Welton* v. *Baltezore*, 25 Neb. 190; notwithstanding the husband may control and manage the property, and it is listed for taxation in his name: *Taggart* v. *Fowler*, 25 Neb. 152. But the wife may expressly bind herself

and her property for her husband's debts: *Wells* v. *Foster*, 64 N. H. 585; *Farnham* v. *Fox*, 62 N. H. 673; or by acquiescence estop herself from asserting her right and title to property as against her husband's creditors: *Meade* v. *Stairs*, 88 Ky. 66. The wife cannot be estopped by acts of her husband done without her knowledge and consent: *Taylor* v. *Riley*, 37 Kan. 90.

ESTOPPEL — PLEADING. — Estoppel must be pleaded, and every fact necessary to create it must be alleged with strictest certainty: *Gray* v. *Pingry*, 17 Vt. 419; 44 Am. Dec. 345, and note. One claiming an estoppel *in pais*, and relying upon it as a defense, must set out the facts constituting it in his answer: *McKeen* v. *Naughton*, 88 Cal. 462. But in *Lites* v. *Addison*, 27 S. C. 227, it is decided that an estoppel need not be specially pleaded, especially as to a defense set up in an answer, which requires no reply. In *Towne* v. *Sparks*, 23 Neb. 142, it is held that in an action of replevin, evidence of an estoppel may be given as a defense under a general denial without being specially pleaded.

FRAUD — PLEADING. — Fraud must be specially pleaded: *People* v. *Healy*, 128 Ill. 9; 15 Am. St. Rep. 90, and note; and this rule applies to fraud set up in an answer as a defense: *Albertoli* v. *Branham*, 80 Cal. 631; 13 Am. St. Rep. 200.

COLORADO IRON WORKS *v.* SIERRA GRANDE MINING COMPANY.

[15 COLORADO, 499.]

FOREIGN CORPORATION — WHAT CONSTITUTES DOING BUSINESS IN THE STATE. — A purchase of machinery by a foreign corporation in one state, to be transported and set up in another, is not within the provisions of a statute that foreign corporations shall not do business within a state until they have filed with the secretary of state a certificate designating their principal place of business therein and an agent upon whom process may be served.

FOREIGN CORPORATION DOING BUSINESS IN THE STATE. — No legislative permission is necessary to allow a foreign corporation to contract for and buy machinery and supplies in one state necessary to the transaction of its business in the state of its domicile, nor is it necessary, in order to allow a foreign corporation to sell its wares or manufactures to the citizens of another state. If in either case a debt is contracted, it may be collected in the courts of such state.

FOREIGN CORPORATION — JURISDICTION IN SUIT AGAINST. — A foreign corporation may buy of a domestic corporation the same as of a natural person, and contract a debt for the articles so purchased. Such debt may be collected in the state where contracted, when the foreign corporation is brought within the jurisdiction by proper service of process.

FOREIGN CORPORATION — PRESUMPTION. — Persons, including corporations, by contracting debts in a foreign jurisdiction will be presumed to have assented to its laws in regard to the collection of the debts, and it is not of controlling importance where or when the original contract out of which the indebtedness grew was perfected or became operative.

FOREIGN CORPORATION — JURISDICTION IN SUITS AGAINST. — Where a corporation makes a contract in a state other than that in which it was

chartered, it thereby submits itself to the jurisdiction of such foreign state, so far as to be liable to suit therein, in regard to that contract, when summoned according to the laws of that state.

FOREIGN CORPORATION — SERVICE OF PROCESS UPON. — A stockholder in a foreign corporation who gratuitously transfers his stock to unknown trustees, for an unknown and undefined purpose, remains a stockholder so that a service of process on a foreign corporation, by delivery of the writ to a stockholder, when it has no agent or officer within the state, as provided by statute, may be made upon such corporation by delivery of the writ to him.

SUIT to recover a balance due on a written contract. The plaintiff is a domestic corporation doing business in Denver. The defendant is a foreign corporation engaged in mining in New Mexico. In 1885, the two corporations entered into a contract by which plaintiff was to manufacture, furnish, and set up for the defendant in New Mexico machinery for the reduction of ores for the sum of $39,260. The contract was fully performed by the plaintiff, and the work accepted by the defendant. Certain payments were made on the contract, and a balance of $11,987.97 remains unpaid. The defendant corporation has not complied with section 260, General Statutes of Colorado, which, so far as is necessary for the purposes of this case, reads as follows: "Foreign corporations shall, before they are authorized or permitted to do any business in this state, make and file a certificate, signed by the president and secretary of such corporation, duly acknowledged, with the secretary of state, and in the office of the recorder of deeds in the county in which such business is carried on, designating the principal place where the business of such corporation shall be carried on in this state, and an authorized agent or agents in this state residing at its principal place of business upon whom process may be served." Service of summons was made by delivery of a copy to Samuel Alsop, an alleged stockholder in the defendant corporation. Such summons and return of service thereon were quashed on motion in the court below, and plaintiff appeals. Other facts are stated in the opinion.

Teller and Orahood, for the appellant.

R. H. Gilmore, for the appellee.

REED, C. The first and most important question to be determined is, whether appellee could be subjected to the jurisdiction of the courts of this state. It is contended that, being a foreign corporation, it had not by its acts and dealings in this state submitted itself to the jurisdiction of the state

courts, and that this cause could not be here tried and determined. There are two or three axiomatic principles applicable to corporations so well understood and generally recognized and conceded that no authorities are necessary in their support. They are, — 1. That a corporation is, in law, for civil purposes, deemed a person; may sue and be sued, contract and be contracted with, and do all other acts which a natural person could do, not *ultra vires;* 2. Being an artificial person, created by and deriving all its powers from its charter, it is local in its character, cannot migrate, can only, in a state or country foreign to that of its creation, make such contracts and do such business as is permitted by the laws of the state, and under such restrictions as may be imposed by its laws.

We do not think section 260 of the General Statutes of this state applicable to the case under discussion, nor that such a construction was intended or contemplated by the legislature. Corporations being, as above stated, confined in their business operations to the state from which they derive their existence, and being only allowed to exercise their functions in a foreign jurisdiction by the comity and under the laws of that state, the intention of the section above referred to was to enable such corporations as moneyed institutions, insurance companies, and that class of corporations, perhaps not to migrate, but by means of agents to extend their business and allow such agencies to become domiciled and transact the business of the corporation under the parent office and original charter. True, in a limited and technical sense, almost any business transaction, no matter how trivial, made by a corporation, whether in its own or an adjacent state,— the buying of goods by a domestic mercantile corporation in New York for the purpose of sale and business here, or any transaction of that kind,—may be deemed the doing of business in New York. A sale and delivery of goods in Wyoming or Nebraska by a domestic corporation of this state might technically be termed doing business in those states; but such accidental or incidental transactions were not, in our view, contemplated by nor within the intention of the legislature in the section under consideration. Nor in this case can the purchase of machinery to be manufactured here, transported to, set up, and operated in New Mexico, nor the selling of ores mined and produced in New Mexico and shipped here to a market, be regarded as doing business in this state as contemplated in such section.

Nor do we deem it necessary that the acts of appellee should be construed to be doing business in this state, outside of the transaction in question, to render it in this case amenable to its courts and subject to its laws. The rule is well settled that a corporation of one state may exercise its functions in another, to any extent permitted by the other. No legislative permission is necessary to allow a foreign corporation to contract for and buy machinery or supplies necessary to the transaction of its business, nor is it necessary, in order to allow a foreign corporation to sell its wares or manufactures to a citizen of this state. Any corporation may sell its products to a party doing business, and if in the purchase a debt be contracted, it can proceed to collect it in our courts. A foreign corporation can, as in this instance, buy of a domestic manufacturing corporation the same as a natural person, and contract a debt for the articles so bought. In order to invoke the aid of our own courts in the collection of such debt, it is not necessary for a citizen of this state to show that the debtor was doing business generally in this state, but that he is a debtor; that the debt is due and payable here; and the debtor, whether a natural or an artificial person, if brought by process within the jurisdiction, is amenable to our courts. Persons, including corporations, by contracting debts in a foreign jurisdiction will be presumed to have assented to the laws in regard to the collection of debt. It is not, as is supposed in argument, of controlling importance where or when the original contract out of which the indebtedness grew was perfected, and became operative, whether at Denver, New Mexico, or Philadelphia, where it was executed by the president of the appellee. The contract appears to have been fully executed by appellant, the work accepted, large partial payments made; all that remained was for appellee to pay the balance due, — an uncontradicted debt, — which by the proofs and former course of dealing was due and payable in Denver, and if not made specifically so, became so by operation of law, no other place having been designated. The appellant, a citizen of this state, had a right to invoke the aid of its courts to collect his debt. A proper regard to the administration of justice, the interests of trade and commerce, and to the rights of citizens, requires that the jurisdiction of courts be sustained, and not circumscribed except by the necessity of law. In cases of this kind for collection of debts, as was well said in *Baltimore etc. R. R. Co.* v. *Gallahue*, 12 Gratt. 655, 65 Am. Dec. 254, which was cited with

approval in *Baltimore etc. R. R. Co.* v. *Harris*, 12 Wall. 65, "It would be a startling proposition if in all such cases citizens of Virginia, and others, should be denied all remedy in her courts for causes of action arising under contracts and acts entered into and done within her territory, and should be turned over to the courts and laws of a sister state to seek redress." If such construction would prevail, it would in many instances work a denial of justice, and give the foreign corporation complete immunity from its contracts. That a corporation may be sued in a foreign jurisdiction is a well-settled general principle, without regard to the manner in which jurisdiction may be obtained, which is a different question, and dependent upon statutes in most states.

In *Bennington Iron Co.* v. *Rutherford*, 18 N. J. L. 158, it is said: "The existence of a foreign corporation is recognized in other states, and they have the capacity to sue and be sued out of their own states."

In *Moulin* v. *Trenton etc. Ins. Co.*, 24 N. J. L. 244: "If they authorize their officers to transact business for them in another state, they thereby subject themselves to the jurisdiction and become answerable to the laws of that state." In the same case, at page 283: "By the comity universally acknowledged in the states of this Union, ... corporations may send their officers and agents into other states, transact their business, and make contracts there; and in some instances, the laws of the states prescribe the mode and the terms upon which they may do so. I am not prepared to say that if they choose to avail themselves of this privilege, natural justice will be violated by subjecting their officers and agents to the service of process on behalf of the corporation they represent; on the contrary, I think natural justice requires that they shall be subject to the action of the courts of the state whose comity they thus invoke. For the purposes of being sued, they ought in such cases to be regarded as voluntarily placing themselves in the situation of citizens of that state. Any natural person who goes into another state carries along with him all his personal liabilities; and there is quite as much reason that a corporation which chooses to open an office and transact its business, or to authorize contracts to be made, in another state, should be regarded as thereby voluntarily submitting itself to the action of the laws of that state, as well in reference to the mode of commencing suits against it as to the interpretation of the contracts so made."

And in *National Cond. Milk Co.* v. *Brandenburgh*, 40 N. J. L. 112: "Since the case of *Moulin* v. *Trenton etc. Ins. Co.*, 24 N. J. L. 222, and 25 N. J. L. 57, it must be regarded as the settled law of this court that if a corporation makes a contract in a state other than that in which it was chartered, it thereby submits itself to the jurisdiction of such foreign sovereignty so far as to be liable to suit therein in regard to that contract, when summoned according to the laws of the state." See also *Bank of Augusta* v. *Earle*, 13 Pet. 519, and *Day* v. *Essex Co. Bank*, 13 Vt. 97, where the same general principles are recognized and asserted; and the same may be said of the courts of most of the states; and that in England the same jurisdiction is asserted over foreign corporations, see *Newby* v. *Colt's Fire-arm Co.*, L. R. 7 Q. B. 293.

The question whether Alsop, upon whom service was had, was or was not, at the time of such service, a stockholder of appellee is not one easy of solution. It is apparent from the record that his relations with the company were such that he very shortly after the service communicated the fact to the counsel of the company; and on the 22d of November, when the first pleading was filed, it is claimed by appellee, and admitted of record, that counsel did not know he was not a stockholder. If he had, at the time of service of process, parted with his stock, and severed his connection with the company, it is not easy to understand why the fact was not stated. The first intimation of the fact appears in the pleading of December 9th. The affidavits introduced to establish the premises were unsatisfactory and evasive. They show that there had been a transfer on the books, and that no stock stood in his name. But the attempt to show why and for what purpose it was transferred to trustees, and for what purpose the trust was created, signally failed, and casts great suspicion on the transaction. The case as made is one where a stockholder holding stock that cost over five hundred dollars gratuitously transfers it to trustees whose names even he does not know, for some unknown and undefined purpose, and at the same time contributes fifty dollars in money. There is a marked discrepancy in one respect between the affidavit of Mellor, president of appellee, and the testimony of Alsop. Mellor states the stock "was transferred for value." Alsop testified that there was no consideration, and says: "There was a request in this circular that those who should transfer their stock to the trustees should make a payment of ten cents a share for

expenses, and I inclosed my check for ten cents on five hundred shares, — fifty dollars." In order to establish the fact pleaded, the testimony should have fairly and unequivocally shown that he had in good faith divested himself entirely of all ownership and interest, and severed all connection with the company. A transfer in name upon the books might be no evidence of a change of ownership. It might be collusive, or made for convenience to allow another, as agent, to represent it. The burden of showing that he was not a stockholder was upon appellee, and he should have established the fact affirmatively, by clear and conclusive testimony, of a change of ownership. The testimony failed to establish it.

Counsel for appellant regard the question as settled by the trial court that Alsop was a stockholder; counsel for appellee regard it as having been left undetermined. We are, after reading the opinion of the trial court, in doubt as to how the question was determined in that court, but are clearly of the opinion that appellee failed in proof to establish the allegation in his plea or motion, and that Alsop must be regarded as having been a stockholder at the time of the service of process.

Section 40 of the Code of Civil Procedure provides: "If the suit be against a foreign corporation, or a non-resident joint-stock company or association doing business within this state, service shall be made by delivering a copy of the writ to an agent, cashier, or secretary thereof; in the absence of such agent, cashier, treasurer, or secretary, to any stockholder."

We conclude, therefore, that the contracting of the debt in question was a sufficient doing business within this state to render the corporation amenable to the courts of this state, if jurisdiction could be obtained by service of process as provided in section 40 of the code. We cannot agree with counsel of appellee that the district courts of this state are courts of limited jurisdiction, and that their jurisdiction over foreign corporations is dependent upon the voluntary acts of such corporations in placing themselves under such jurisdiction by complying with the requirements of section 260, General Statutes. They are courts of general jurisdiction, but depending, in obtaining such jurisdiction over corporations, upon the statute in so far as the statute departs from the common law in providing in what manner service can be had. We also conclude that Alsop, at the time of service, was a stockholder, and that the service upon him brought the appellee within the

jurisdiction of that court, and that the court erred in sustaining the motions or pleas in abatement of the action. We advise that the judgment be reversed, and the cause remanded.

BISSELL, C., and RICHMOND, C., concurred.

Per CURIAM. For the reasons stated in the foregoing opinion, the judgment below is reversed.

FOREIGN CORPORATIONS — SERVICE OF PROCESS ON: See *Shickle etc. Co.* v. *Wiley etc. Co.*, 61 Mich. 226; 1 Am. St. Rep. 571, and note. Service of process on an officer of a foreign corporation, accidentally within the state, is not valid: Note to *Hampson* v. *Weare*, 66 Am. Dec. 122. But service on a resident officer or agent of a foreign corporation, who has charge of such corporation's business in the state, is good: *Gross* v. *Nichols*, 72 Iowa, 239; *Norton* v. *Berlin Iron B. Co.*, 51 N. J. L. 442.

FOREIGN CORPORATIONS — LEGISLATIVE CONTROL OVER. — The legislature cannot regulate or restrict the business of a foreign corporation within the state so as to interfere with the right of interstate commerce: *Gulf etc. R'y Co.* v. *State*, 72 Tex. 404; 13 Am. St. Rep. 815; *State* v. *Indiana etc. Co.*, 120 Ind. 575.

CORPORATIONS — "PERSONS." — Corporations are in law, for civil purposes, deemed to be persons, and, as such, may sue and be sued: *Baltimore etc. R. R. Co.* v. *Gallahue*, 12 Gratt. 655; 65 Am. Dec. 254, and note. Compare *Haverhill Ins. Co.* v. *Prescott*, 42 N. H. 547; 80 Am. Dec. 123, and note 126, 127.

SLATER *v.* HASS.

[15 COLORADO, 574.]

MINING PARTNERSHIP — RIGHTS OF RETIRING PARTNER. — When the co-tenants of a mine employ a manager to work it and to account to them for the proceeds, thus forming a partnership, after which one of the co-tenants withdraws from such arrangement so far as the manager is concerned, without dissolving the partnership as to the remaining co-tenants, he may maintain an action in his own name, without joining his co-tenants, to recover from such manager his share of the proceeds of the mine subsequently coming into his hands.

S. J. Hanna, for the appellant.

Per CURIAM. The assignments of error are confined to the overruling of defendant's motion for nonsuit and to the rendering of final judgment in favor of plaintiff. The trial in the county court was without a jury, and the only objections or exceptions appearing in the record are as follows: At the close of plaintiff's evidence, "the defendant's counsel moved the court for a nonsuit, on the ground that plaintiff had failed

to prove a good cause of action, which motion the court overruled." The defendant excepted to the ruling, and also excepted to the finding and decision of the court against him at the close of the trial, but did not state the grounds of his objection.

There being no written pleading (*Thorne* v. *Ornauer*, 8 Col. 353), the questions to be determined on this appeal must be gathered from the evidence. The evidence shows that plaintiff and several other persons, some of them non-residents, were tenants in common of a certain mine in Lake County, plaintiff's interest being one eighth. These co-tenants employed Slater to work the mine, extract and sell the ores, and account to the owners for the proceeds. By this arrangement, it is assumed by counsel for appellant that plaintiff and his co-owners entered into a copartnership, thus constituting a relationship different from that existing between them as tenants in common, and hence that plaintiff cannot maintain this action in his own name for his share of the proceeds of the mine in the hands of the defendant arising out of such employment. There is no evidence of an express contract of copartnership having been agreed to between the several owners for any fixed or definite period, or at all. Nevertheless, the existence of a mining partnership, with its peculiar limitations and conditions, may perhaps be inferred from the acts of the parties and the circumstances appearing in evidence: *Manville* v. *Parks*, 7 Col. 128; *Charles* v. *Eshleman*, 5 Col. 111.

During the progress of the work a controversy arose between the plaintiff, Haas, and the defendant, Slater, as to the rate of wages per month the latter was to receive under his contract of hiring; and finally plaintiff undertook by written notice to defendant to terminate defendant's employment so far as plaintiff's interest in the mine was concerned. In such notice plaintiff declared that after a certain date, so far as his (plaintiff's) interest was concerned, he would dispense with defendant's services, and would in no way be responsible for any debts that might be contracted in connection with said mine without his personal consent. This notice was received by defendant, and the substance thereof was promptly communicated by him, in writing, to the other owners. In such communication defendant, Slater, declared that so long as the other owners chose to retain him in their employ it would not increase their expenses at all, but would only

decrease his salary twelve and one half per cent,—that is, one eighth,—and that he was ready to relieve plaintiff, Haas, of the burden of his salary. It does not appear that the other owners made any objection to this new arrangement. In addition to giving defendant notice of his withdrawal from the enterprise of working the mine, plaintiff also posted a written notice at the shaft-house, giving similar notice to all persons employed by or dealing with Slater in working the mine.

The acceptance of plaintiff's notice by defendant, and his express assent to its terms, the communication thereof to the other owners, and their acquiescence therein, together with his posted notice to all other persons interested, justify the conclusion that there was a withdrawal by plaintiff from any mining copartnership which may have theretofore existed between the several co-tenants. The other owners, as well as plaintiff and defendant, having notice of the new arrangement, the court was warranted in finding that there was a complete termination by mutual consent of plaintiff's liability to defendant under the original contract of employment, and that by this means plaintiff's interest in the proceeds of the mining property was entirely severed from that of his co-tenants.

The defendant continued working the mine and extracting ores therefrom for several months after the withdrawal of plaintiff as aforesaid. The evidence was somewhat conflicting as to the rate of monthly wages the defendant was entitled to receive; but it is clear that defendant, at the close of his employment, reserved out of the proceeds of the mine his monthly wages at the full rate and for the full time as originally claimed by himself, disregarding altogether the abrogation of the original contract resulting from plaintiff's written notice, his own response, and the acquiescence of the other owners.

Though not specifically so stated, it is obvious that the finding and judgment of the court were based upon the amount of plaintiff's interest in the surplus proceeds of the mine in the hands of defendant, according to the theory that plaintiff's liability under the original contract had been terminated and his interest in the proceeds of the mine severed from that of his co-tenants.

The findings of fact by the trial court upon the conflicting evidence cannot properly be disturbed. Plaintiff's share in

the proceeds of the mine having been entirely severed from that of his co-tenants, there appears to be no legal obstacle to his recovery of the same in this action. The judgment of the county court is accordingly affirmed.

CO-TENANCY — RIGHT OF ONE CO-TENANT TO MAINTAIN AN ACTION WITHOUT JOINING HIS CO-TENANTS. — As to joinder of co-tenants as parties plaintiff, see *Lothrop* v. *Arnold*, 25 Me. 136; 43 Am. Dec. 256, and note.

CASES

IN THE

SUPREME COURT

OF

GEORGIA.

Dutcher *v.* Hobby.

[26 Georgia, 198.]

Subrogation — Purchaser at Void Foreclosure Sale. — Where property sold under a void foreclosure of a mortgage thereof has been purchased by one at sheriff's sale, and the purchase-money applied to the payment of the mortgage, and the sale and purchase are subsequently set aside and declared void, the purchaser may be subrogated to all the rights which the mortgagee originally had.

Petition by Hobby as trustee, for the use of Warren, administrator of Caswell, against several of the Bunches and Dutcher. The petitioner conveyed certain land to Mrs. Bunch and her children, for the purchase price of which she gave her notes for six hundred dollars, secured by mortgage. The land was subsequently sold at foreclosure sale and purchased by Caswell, who received a sheriff's deed and paid the purchase-money to the mortgagee. The Bunches resisted Caswell's right to take possession, offering to refund the purchase-money, and alleging that the foreclosure was void. This suit was dismissed, and ejectment brought to recover the land for Caswell's estate. Dutcher in the mean time acquired a lien as attorney for the Bunches, which he proceeded to foreclose. The land was sold under a fraudulent tax levy, purchased by one Banks, and fraudulently transferred by him to one of the Bunches, who is in possession, claiming title in fee, free from the mortgage lien. The petition prays for a decree foreclosing the mortgage for the purchase-money, the same to be paid to Warren, and declaring the sheriff's deed to Bunch to be void,

and that Dutcher's claim rest on what remains after payment of the purchase-money, and that he be restrained from enforcing any judgment on his lien until the priorities are settled by final decree. Dutcher demurred on the ground that the matter alleged was not sufficient basis for the relief sought. The demurrer was overruled, and he appealed.

Salem Dutcher, for the plaintiff in error.

Frank H. Miller, for the defendants in error.

BLANDFORD, J. The main question in this case is, whether, where property sold under a void foreclosure of a mortgage as the property of the mortgagor, which has been purchased by one at sheriff's sale, and the purchase-money applied to the payment of the mortgage, and said sale and purchase is afterwards set aside and declared void, such purchaser can be subrogated to the rights which the mortgagee originally had to have his mortgage foreclosed, and the property therein conveyed sold in discharge of the lien of the mortgage. It will not be necessary to consider any other question made by this record. While we are not permitted to lift the veil of the future, we take the liberty of pushing back the shutters of the past so as to let the light shine upon this question.

We think the authorities sufficiently answer this question in the affirmative. In 2 Freeman on Executions, 2d ed., sec. 352, it is laid down that a purchaser at a void judicial sale under foreclosure has the same right as the original mortgagee himself. In *Brobst* v. *Brock*, 10 Wall. 534, the court says: "It is enough that an irregular or a void judicial sale, made at the instance of a mortgagee, passes to the purchaser all the rights the mortgagee, as such, had." In *Gilbert* v. *Cooley*, Walk. Ch. 494, it was held that though a statutory foreclosure of a mortgage be irregular, and no bar to the equity of redemption, yet a purchaser at such sale succeeds to all the interest of the mortgagee. To the same effect, see the case of *Jackson* v. *Bowen*, 7 Cow. 13, wherein the court held that a conveyance by a mortgagee, as upon a statutory foreclosure under the power of sale in his mortgage, even if the proceedings to foreclose be irregular, yet carries all his interest as mortgagee to the purchaser, as well in the debt as the land mortgaged. Such a deed operates as a good assignment, and the purchaser may claim as assignee. See also Rorer on Judicial Sales, sec. 224; 1 Jones on Mortgages, 874, subd. a, sec. 878; Freeman on Void Judicial Sales, 51–53; *Davis* v. *Gaines*,

104 U. S. 386; *Bentley* v. *Long*, 1 Strob. Eq. 43; 47 Am. Dec. 523; *Howard* v. *North*, 5 Tex. 290; 51 Am. Dec. 769; *Robertson* v. *Bradford*, 73 Ala. 116; *McGee* v. *Wallis*, 57 Miss. 638; 34 Am. Rep. 484. In 1 Story's Eq. Jur., sec. 478, it is said: "Such principle has the highest and most persuasive equity as well as common sense and common justice for its foundation." The cases cited by the learned counsel for the plaintiff in error will be found, upon examination, to apply to the doctrine of *caveat emptor*, which applies to sales upon valid judgments, and is usually invoked with reference to sales upon executions issued against the general property of the judgment debtor: See *Boggs* v. *Fowler*, 16 Cal. 559; 76 Am. Dec. 561; *Smith* v. *Painter*, 5 Serg. & R. 223; 9 Am. Dec. 344. And such we find to be the cases in the Georgia Reports cited in the brief for the plaintiff in error.

So we are satisfied that the court committed no error in overruling the demurrer filed by the plaintiff in error in this case to the petition of the defendants in error; and the judgment is affirmed.

SUBROGATION — RIGHTS OF PURCHASERS TO, AT VOID JUDICIAL SALES: See note to *Valls* v. *Fleming*, 77 Am. Dec. 564, 565; compare also *Wilton* v. *Maybury*, 75 Wis. 191; 17 Am. St. Rep. 193, and note; *Magill* v. *De Witt etc. Bank*, 126 Ill. 244.

RICHMOND AND DANVILLE RAILROAD CO. *v.* BENSON.

[86 GEORGIA, 203.]

SUMMONS — AMENDMENT. — Where a summons dated July 16th requires the defendant to appear on the first Monday in July, instead of the first Monday in August, as prayed for in the declaration, it is not void, upon the appearance of the defendant at the latter date, and may be amended on motion.

COMMON CARRIERS — LIABILITY FOR GOODS NEGLIGENTLY HELD AND LOST AFTER ARRIVAL. — Where goods are directed to be shipped to a certain point, and instead of sending them direct, the carrier transports them in a roundabout way, thereby causing a delay of eight days in their arrival, and two days subsequent thereto they are destroyed by flood, the carrier is liable for their loss, especially when the consignee has made daily demands for the goods at the point of destination from the day when they should have arrived up to the day of loss.

COMMON CARRIER — CONTRACT OF CARRIAGE, WHEN WILL NOT EXCUSE LIABILITY. — When goods marked with a certain number have arrived at their destination, and are afterwards lost by flood while in the hands of the carrier, and after they have been demanded by the consignee upon his bill of lading for goods marked with the same number, a con-

tract of carriage with the shipper exempting the carrier from liability for "wrong carriage or wrong delivery of goods marked with initials, numbers, or imperfectly marked" will not excuse the carrier for liability for the loss.

COMMON CARRIER. — BILL OF LADING IS ADMISSIBLE IN EVIDENCE, if otherwise sufficiently proved to exist, without proof of its execution, or of the signature thereto, or of the agency of the person purporting to have signed it.

COMMON CARRIER — NEGLIGENCE — LIABILITY FOR COUNSEL FEES. — In an action against a common carrier for loss of goods through negligence, he is not liable for counsel fees in addition to actual damages, in the absence of evidence that he has acted in bad faith or has been stubbornly litigious for the purpose of putting the plaintiff to unnecessary expense.

Pope Barrow, for the plaintiff in error.

J. S. and W. T. Davidson, for the defendant in error.

SIMMONS, J. Benson & Co. sued the railroad company for damages occasioned by the loss of certain goods described in the declaration. The process attached to the declaration commanded the defendant "to be and appear at the city court of Richmond County next to be holden in and for the county aforesaid, on the first Monday in July, 1889"; and was dated July 16, 1889, and signed by the clerk of the city court. The regular term of the court was the first Monday in August. The defendant, by its counsel, appeared at the regular term, and moved to dismiss the case because the process was void. On motion of plaintiff's counsel, the court allowed the process to be amended; and to this ruling the defendant excepted *pendente lite*, and assigned error thereon. The trial was had, and the jury returned a verdict for the plaintiff. The defendant moved for a new trial on the grounds set out in the motion, which was refused, and it excepted.

1. We do not think the court erred in allowing the process to be amended. We do not agree with counsel for the plaintiff in error that the process was void, and therefore not amendable under section 3490 of the code. The declaration prayed for process requiring the defendant "to be and appear at the August term" of the court; and the process was issued in the name of the judge of that court, and signed by the clerk thereof, but by a clerical mistake the defendant was cited to appear the first Monday in July, instead of the first Monday in August. The court had jurisdiction of the case, and it seems from the record that the process was sufficient to bring the defendant to the regular term of the court, at which time it made this motion to dismiss. Among the powers conferred

upon every court by the code (sec. 206, subd. 6) is the power "to amend and control its process and orders so as to make them conformable to law and justice." In the case of *Townsend* v. *Stoddard*, 26 Ga. 430, where the process required the defendant to appear on the second Monday in April, and the time fixed by law for holding the court was the fourth Monday in April, this court held the process amendable. In *Covington* v. *Cothrans*, 35 Ga. 156, it was held that an attachment issued on the 3d of April, 1866, returnable to the "inferior" court, was amendable by inserting the word "county," instead of "inferior." Walker, J., in delivering the opinion of the court, said: "The defendant was not ignorant of the court to which the process was returned, for he appeared at the proper term and objected to the proceedings because a single word, 'inferior,' had been used by the mistake of a ministerial officer for the word 'county.' The time for such trifling is past." In the case of *Blake* v. *Camp*, 45 Ga. 298, an attachment was sued out, returnable by law to the 1120th district G. M., but the magistrate, by mistake, made the attachment returnable to the 919th district. The levying officer returned the papers to the proper district, to wit, the 1120th, and judgment was then entered upon the attachment. It was held that the judgment was not void, and McCay, J., said: "We do not think this mistake makes the proceedings void. It is not the written direction to the sheriff or constable which gives the court jurisdiction, but the law. If the officer had obeyed the direction, and returned the papers as directed, the court to which it would then have been returned would not have had jurisdiction, and the judgment would have been void. As it is, the court which tried the case was authorized to do so by the statute. Our statute of amendments is very broad. No technical objections even to a process are to be regarded, if the court has jurisdiction." In the case of *Williams* v. *Buchanan*, 75 Ga. 789, the original process required the defendant to appear "on the second Monday in April next," but by mistake the copy process required him to appear "on the second Monday in December next." The process was dated December 28th. The following April was the time of the regular term, and no term of the court was to meet in December. It was held that service of this declaration and copy process was sufficient to put the defendant on notice of the case. Jackson, C. J., in the course of the opinion, said: "When a man knows that he is sued, and is served with a copy of the declaration

which tells him what he is sued for, and in what court, it would be well for him to step to the clerk of that court and find out something about any little mistake in the process, and attend at the first term to take advantage of the mistake, if it would avail him, or have it corrected and put off a term, if the court so decided; especially would it be prudent not to delay action until after trial term, verdict, judgment, and execution, and then set up the mistake of the clerk, which must have been known to him the moment he read the copy declaration and process handed him by the sheriff, and called to mind the fact, known to everybody in Sumter County, that the superior court met in April, and not in December." The code, section 3345, declares: "No technical or formal objections shall invalidate any petition or process, but if the same substantially conforms to the requisitions of this code, and the defendant has had notice of the pendency of the cause, all other objections shall be disregarded; provided, there is a legal cause of action set forth as required by this code."

The ruling in *Lowrey* v. *Richmond and Danville R. R. Co.*, 83 Ga. 504, does not conflict with the ruling in this case. As will be seen from a casual reading of that case, its facts were different from the facts in the present case. In that case the petition was addressed to the city court of Atlanta, and process was prayed returnable to that court; but the clerk of the superior court of Fulton County, who was also *ex officio* clerk of the city court, annexed to the declaration and to the copy which was served on the defendant a process requiring it to appear at an impossible term of the superior court, which process bore test in the name of the judge of the superior court, and was signed by the clerk of the superior court. The process was held to be void for the reason that the suit was filed in the city court, but the process required the defendant to appear in the superior court, and bore test in the name of the judge of the superior court, and was signed by the clerk of the superior court as such, and not as clerk of the city court of Atlanta.

2. The main question argued before us in this case was as to the liability of the railroad company under the facts disclosed in the record. Counsel for the plaintiff in error insisted that the railroad company was not liable, because the goods were destroyed by an unprecedented flood, and under the law a common carrier is not liable for damage occasioned by the act of God. Counsel for the defendant in error replied

that while it was true that the goods were destroyed by the flood, the facts show that if it had not been for the negligence of the defendant in delaying the goods an unreasonable time upon its road, and detaining them in its depot after arrival at their destination, the flood would not have operated so as to injure or destroy them. Whether the law be that a common carrier is not liable when the damage is caused by the act of God, though the negligence of the carrier contributed to the damage, or whether it be that the carrier is liable when the carrier's negligence concurs with the act of God in causing the damage, is a question upon which we find the authorities very conflicting; but it is unnecessary for us to decide that question here. The facts show that the goods were directed to be shipped from Richmond, Virginia, to Augusta, Georgia; but instead of shipping them directly to Augusta, the carrier shipped them first to Atlanta, Georgia, and reshipped them from Atlanta to Charlotte, North Carolina, and from Charlotte, North Carolina, shipped them to Augusta. They should have been received in Augusta on the first day of September, but they were not received until the 8th. On the 10th they were damaged by flood. The evidence shows that from the 1st of September up to the time of the flood the consignees sent every day to the depot of the railroad company and asked for the goods, and were informed that they had not arrived. Miller, the clerk of the consignees who went to the agent of the railroad company and asked for the goods, testified: "I am quite sure I took the bill of lading with me and showed it. It was plainly marked on that that the box was for Benson & Co. We kept sending for the goods up to the day of the flood." It also appears that while the box was not marked with the name of Benson & Co., the consignees, but was marked simply with the figure 3005, in lieu of the name, their name did appear on the "way-bill" sent by the company to its agent in Augusta; and that the agent admitted, after the flood, that the loss was occasioned by carelessness at headquarters in not sending the way-bill with the goods; that the goods had arrived two days before the flood, and the way-bill was not received by him until after the goods were destroyed. Under these facts, we think that when Benson & Co. sent their clerk to the agent at Augusta and demanded the goods, and the clerk showed the agent the bill of lading with the entries thereon, and told him that the goods were a box of cheroot cigars (as he said in his evidence

he told him), and the goods were then in the possession of the railroad company, as the evidence shows they were, and the agent failed or refused to deliver them, it was a conversion of the goods on the part of the railroad company, and if the goods were subsequently destroyed by the flood, the railroad company was liable for the value thereof. If the goods had arrived at their destination and were in the possession of the railroad company, and Benson & Co. had carried their bill of lading and demanded possession thereof, and the company had refused to deliver them, Benson & Co. could have commenced their action of trover at once against the railroad company and recovered the value of the goods, although they were subsequently destroyed by the flood.

But it is claimed by the railroad company that it could not deliver the goods to Benson & Co., because its contract of carriage with the shipper exempted it from liability from "wrong carriage or wrong delivery of goods that are marked with initials, numbers, or imperfectly marked"; and that as these goods were simply marked 3005, the railroad company was not liable because it did not deliver them. We think that if the railroad company had delivered them to somebody else who had a bill of lading for a package of goods marked 3005, it perhaps would not have been liable; but as it did not deliver them to any one, and refused to deliver them to Benson & Co. when demanded upon their bill of lading, we do not think this clause in the contract applies.

3. It is complained that the court erred in admitting in evidence the bill of lading, because there was no proof of its execution, or of the signature thereto, or of the agency of the person purporting to have signed it. Under the evidence, we think there was no error in admitting the bill of lading, as it was sufficiently proved.

4. The plaintiff in error also complains that the court erred in charging the jury: "If you believe from the evidence that the defendant has acted in bad faith, or has been stubbornly litigious, or that it has put the plaintiffs to unnecessary expense in this matter, then you can add to the actual damages reasonable attorneys' fees"; and that under this charge the jury returned a verdict for thirty dollars attorneys' fees, and that this verdict was contrary to the evidence. We think this exception is well taken. There is no evidence in the record that the defendant acted in bad faith, or was stubbornly litigious, or put the plaintiffs to unnecessary expense. All that

the defendant in the court below seems to have done was to appear in court and insist on what it claimed was its legal rights. The judgment must therefore be reversed, and a new trial had, unless the plaintiff shall voluntarily write off from the verdict the sum of thirty dollars; but in the event the plaintiff shall consent to do so, the judgment of the court below shall stand affirmed.

Judgment reversed, with direction.

SUMMONS, WAIVER OF DEFECT IN, BY APPEARANCE. — A voluntary appearance waives all objection to a summons and the return thereof: *Union P. R'y Co.* v. *De Busk*, 12 Col. 294; 13 Am. St. Rep. 221, and note; *Johnston* v. *San Francisco S. Union*, 75 Cal. 134; 7 Am. St. Rep. 129; *Cartwright* v. *Chabert*, 3 Tex. 261; 49 Am. Dec. 742; *Hanna* v. *McKenzie*, 5 B. Mon. 314; 43 Am. Dec. 122, and note; *Austin* v. *Burroughs*, 62 Mich. 181; *Roberts* v. *Allman*, 106 N. C. 391. A bill was filed May 5th, but the summons bore date April 5th. It was held that the summons would be regarded as having been issued in May, and that the use of the word "April" was a mere clerical error: *Hemmer* v. *Wolfer*, 124 Ill. 435.

COMMON CARRIER — NEGLIGENCE — LIABILITY FOR GOODS LOST. — The liability of a common carrier is that of an insurer against all losses except those caused by the act of God, the public enemy, or the contributory negligence of the consignor: *Alabama G. S. R. R. Co.* v. *Thomas*, 89 Ala. 294; 18 Am. St. Rep. 119, and note; *Fox* v. *Boston etc. R. R. Co.*, 148 Mass. 220; *Missouri P. R'y Co.* v. *Young*, 25 Neb. 651. A railroad company must transport goods with reasonable dispatch, and is liable for any injury caused by a negligent delay: *Gulf etc. R'y Co.* v. *Ellison*, 70 Tex. 491; *Feinberg* v. *Delaware etc. R. R. Co.*, 52 N. J. L. 451; see note to *Norris* v. *Savannah etc. R'y Co.*, 11 Am. St. Rep. 360–366.

COMMON CARRIER — LIMITATION OF LIABILITY BY CONTRACT. — A carrier may not limit his liability by contract so as to evade responsibility for negligence: *Alabama G. S. R. R. Co.* v. *Thomas*, 89 Ala. 294; 18 Am. St. Rep. 119; *Witting* v. *St. Louis etc. R'y Co.*, 101 Mo. 631; 20 Am. St. Rep. 636, and note; *Southern P. R'y Co.* v. *Maddox*, 75 Tex. 300; *Bochl* v. *Chicago etc. R'y Co.*, 44 Minn. 191.

COMMON CARRIER — BILL OF LADING — ADMISSIBILITY IN EVIDENCE: See note to *Chandler* v. *Sprague*, 38 Am. Dec. 409. Secondary evidence cannot be received as to the contents of a bill of lading without laying a proper foundation therefor: *Alabama etc. R. R. Co.* v. *Mt. Vernon Co.*, 84 Ala. 173; notwithstanding the fact that it is in the possession of the defendant: *Columbus etc. Ry Co.* v. *Tillman*, 79 Ga. 607.

Nashville, Chattanooga, and St. Louis Railway Company v. Heggie Brothers.

[86 Georgia, 210.]

Common Carriers — Liability for Negligence in Carriage of Live-stock. — Under section 4386, United States Revised Statutes, relating to the carriage of live-stock by common carriers, it is negligence *per se* for a railroad company to keep live-stock upon its cars for more than twenty-eight consecutive hours without unloading them for rest, water, and feeding; and the company is liable not only for the penalty prescribed in the statute, but also for all damages or injury that may thereby be sustained by the owner of the stock.

Common Carriers — Liability for Negligence in Carriage of Live-stock. — In an action against a railroad for negligence and non-compliance with the statute in transporting live-stock, by keeping them confined in the cars for more than twenty-eight consecutive hours, the fact that the company's stock-yard at its feeding-station was on fire upon the arrival of the train will not excuse it for not furnishing the person in charge of the stock all proper facilities for caring for them, in compliance with the contract of shipment, nor for failing to stop the train at some other station, so that the stock, after they had been on the cars more than twenty-eight consecutive hours, might be unloaded, watered, and fed by the person in charge, notwithstanding his want of diligence in not urging that the train be so stopped for that purpose.

J. B. Cumming and Bryan Cumming, for the plaintiff in error.

Fleming and Alexander, for the defendants in error.

Simmons, J. This was an action brought by the defendants in error against the plaintiff in error for damages caused to a certain car-load of horses by reason of the negligence of the plaintiff in error in not stopping its cars so as to give the defendants in error an opportunity to water and feed their horses. A verdict was had for the defendants in error, and the railway company moved for a new trial, which was denied by the court, and it excepted to this ruling, alleging as error the special grounds set forth in its motion.

The evidence showed that the horses were shipped from St. Louis to Augusta, and had been on board of the train about twenty-six hours when the train arrived at Nashville; that the person in charge of the horses made inquiries of certain persons about the train as to getting the horses off, and having them fed and watered, and was told that this could not be done; the stock-yards of the company were on fire when the train reached Nashville; no opportunity was afforded to the agent of the defendants in error to unload the horses for

the purpose of feeding and watering them, by the railroad company, or any of the employees thereof, but the car in which the horses were loaded was attached to another train, which proceeded through to Chattanooga without giving an opportunity at any intermediate station for the horses to be taken care of. The special contract under which the horses were shipped was put in evidence, to the following effect: That the tariff rate on the shipment to Augusta was $226 per car; that in consideration of the fact that the car was to be transported for $113, and a free passage to the owner or his agent on the train with the animals, this being a special rate lower than the regular rate, the shipper released the railroad company and its connecting lines from the liability of a common carrier in the transportation of the animals, and agreed that such liability should be only that of a private carrier for hire; that the shipper agreed that he would load and unload the animals at his own risk, and feed, water, and attend the same at his own expense and risk while they were in the stock-yards awaiting shipment, and while on the cars or at feeding or transfer points, or where they might be unloaded for any purpose; that while the employees of the railroad should provide the owner or person in charge of the animals all proper facilities on trains and at stations for taking care of the same, the business of the railroad should not be delayed by the detention of the trains to unload and reload the animals for any cause whatever, but the car might be left at a station, upon the request of the person in charge of the same, and unloaded and reloaded by him; that should damage occur for which the railroad might be liable, the value at the date and place of shipment should govern the settlement, in which the amount claimed should not exceed, for a horse or mule, $100, which amount, it was agreed, was as much as such animals were reasonably worth. This agreement was dated February 14, 1889. It was shown by the evidence that neither the railroad company nor any of its employees provided the person in charge of the animals with any facilities whatever for taking care of the same, notwithstanding it appears that the person in charge in behalf of the owners of the horses applied to various persons who seemed to be connected with the railroad for permission and opportunity to unload the cars at Nashville, in order that he might feed and water the animals, and give them the required rest after their long journey. Nor were the cars left at Nashville, which was a

feeding-station; but they were attached to another train, which proceeded through to Chattanooga. It is very clearly shown by the testimony that the damage to the stock was caused in consequence of the fact that they were kept on board of the cars for over forty hours, without rest or food or water. Therefore we think the verdict of the jury was warranted by the testimony in the case.

Section 4386 of the Revised Statutes of the United States provides that "no railroad company within the United States whose road forms any part of a line of road over which cattle, sheep, swine, or other animals are conveyed from one state to another, or the owners or masters of steam, sailing, or other vessels carrying or transporting cattle, sheep, swine, or other animals from one state to another, shall confine the same in cars, boats, or vessels of any description, for a longer period than twenty-eight consecutive hours, without unloading the same for rest, water, and feeding, for a period of at least five consecutive hours, unless prevented from so unloading by storm or other accidental causes." We think, under this statute, that where a railroad company keeps live-stock upon its cars for more than twenty-eight consecutive hours, this constitutes negligence *per se*, and such railroad company is liable not only for the penalty prescribed in the statute, but also for any damages or injury that may thereby be sustained by the owner of the stock. We furthermore think that, under the contract between these parties, it was the duty of the railroad company to have afforded the person in charge and having care of these animals an opportunity to unload the same upon their arrival at Nashville, or at some other place, when they had been upon the cars twenty-eight consecutive hours; and having failed to afford this opportunity of feeding and watering the stock and giving them the required rest, the railroad company is liable for the consequences of any injury to the animals that may have ensued thereby. And while the statute of the United State was an act in favor of humane treatment of animals while being transported, yet we think that a violation of the same on the part of the railroad company was negligence in itself for which they would be liable. So we think the verdict of the jury was not without evidence to support it; nor do we think it was contrary to law. The fact that the stock-yards of the defendant were on fire when the train arrived at Nashville was not sufficient excuse for not furnishing to the person in charge of the animals, under the contract, all proper facili-

ties for taking care of the same; nor was it a sufficient excuse for not stopping the car five hours, there or at some other station, as provided for in the statute, so that the animals, after they had been upon the cars twenty-eight consecutive hours, might be unloaded and watered and fed by the person in charge.

Should it be thought that the agent of the owner in attendance upon the stock was deficient in urging compliance with the statute, the railroad employees knew, or should have known, of that want of diligence on his part; and as it was for them to select the place for stopping, and to comply with the statute, with or without his request, his failure in diligence is no excuse for the company under the act of Congress. The owner of the stock not being present, his servant and the company's servants had no right, as against him, to violate the statute any more than as against the United States.

Judgment affirmed.

COMMON CARRIERS — LIABILITY FOR NEGLIGENT CARRIAGE OF LIVE-STOCK. — A railroad company receiving live-stock for transportation is liable as a common carrier: *Kansas etc. R'y Co.* v. *Nichols*, 9 Kan. 235; 12 Am. Rep. 494, and extended note; *Railway Co.* v. *Wynn*, 88 Tenn. 320. Compare note to *Rixford* v. *Smith*, 13 Am. Rep. 53.

BROWN *v.* SMITH.

[86 GEORGIA, 274.]

MASTER AND SERVANT — HIRER OF ANOTHER SERVANT, WHEN BECOMES MASTER. — Where a master has hired his servant to another, giving the latter the complete and absolute control and direction of the servant, with the exclusive right to discharge him, put another in his place, or put him at other work, the original master is not liable for his negligence, although he receives pay for the work so done by him, as he is for the time being the servant of the hirer.

Lester and Ravenel, for the appellant.

O'Connor and O'Byrne, for the respondents.

SIMMONS, J. Brown sued Smith and Kelly for damages, alleging, in substance, that he was engaged as a laborer in discharging a vessel laden with coal lying at the wharf of C. H. Dixon, in Savannah; that it was his duty to remain in the hold of the vessel to receive empty tubs as they were lowered into the hold, and to unhook them from the hoisting-rope, and hook thereon full tubs to be hoisted therefrom; that there was

also then and there employed in discharging the vessel a certain pair of mules, the property of said Smith and Kelly, managed and controlled by their servant, these mules being attached to a rope used in hoisting the coal, and being driven by said servant of the defendants; that during the discharging of the vessel it was the duty of this servant, as an empty tub was loaded into the vessel, to keep the mules stationary while the plaintiff unhooked the empty tub from the rope and hitched thereto a full tub, and not to drive the mules off or permit them to walk off until satisfied that the plaintiff had finished the hooking and unhooking; that an empty tub had been lowered into the hold, and while he was engaged in unhooking it from the rope, and before he had finished doing so, the driver of the mules, without any signal so to do, negligently and carelessly permitted the mules to walk off, jerking the empty tub against the petitioner's hand, catching the hand between the tub and the side of the hatchway, and crushing and mashing it so as to make it necessary to amputate the third finger, depriving him of the use of his hand and causing him to lose time and money, etc., and giving him great pain. The jury returned a verdict in favor of the defendants, and the plaintiff moved for a new trial, which was refused, the court holding that under the evidence the plaintiff was not entitled to recover, because the driver of the mules was not the servant of the defendants, but the servant of Dixon. The evidence on this point, in substance, was, that Dixon had a vessel loaded with coal, and employed Brown, the plaintiff, to assist in unloading it, and hired from Smith and Kelly a pair of mules and a driver. The mules were to be hitched to a rope, and by this means were to pull the tubs of coal out of the hold, upon the dock. Although Dixon hired the mules and driver from Smith and Kelly, he had full control of both; they were under his control and direction during the time the work of unloading the coal was in progress, and when the driver was not driving the mules, Dixon had the right to put him at any other work in and about the vessel. And although he did not pay the driver for his work, but paid Smith and Kelly for the hire of the mules and the driver, he nevertheless had the right, under the contract with Smith and Kelly, to discharge the driver and appoint a substitute in his place, if the driver was careless or incompetent. Smith and Kelly had no right to give any directions to the driver while in the service of Dixon, nor to control him in any manner dur-

ing that time, but he was to be under the absolute control of Dixon during the progress of the work.

Under this state of facts, we think the court was right in holding that the driver of the mules was not the servant of Smith and Kelly in that particular work, and that the plaintiff could not recover from them. While it is true that the driver of the mules may have been the general servant of Smith and Kelly, yet when they hired him to Dixon for this particular work, and gave Dixon control over him, and the right to discharge him if Dixon found it necessary, the driver became the special servant of Dixon for that occasion, and Smith and Kelly would not be liable for his negligent acts while thus in the employment of Dixon. Wood, in his work on master and servant, section 317, says: "The real test by which to determine whether a person is acting as the servant of another is to ascertain whether, at the time when the injury was inflicted, he was subject to such person's orders and control, and was liable to be discharged by him for disobedience of orders or misconduct." In Whittaker's Smith on Negligence, page 165, it is said: "Where a master allows his servant to be hired by another, he remains liable to the hirer and to strangers for negligence of such servant; and even where that other himself selects the servants, although the master might not be liable for mere incompetency, yet he would be so for negligence. If the master abandons all control over the servant and all right to discharge him, and these rights are taken by the hirer, of course the servant becomes the servant of the hirer."

In Shearman and Redfield on Negligence, section 162, it is said: "If the hirer is vested for the time with the exclusive right to discharge the servants and employ others, he alone is responsible for their defaults."

We have seen from the evidence above quoted that Dixon had the exclusive right to discharge this driver and employ another in his place. He had the right absolutely to control and direct the driver. He had the right to take him from the mules and put him at other work. In other words, he had as ample and complete control over the driver as if he had originally hired him. We think, therefore, that, under these authorities, and others which will be cited, when Brown was injured by the carelessness of the driver, the driver was not the servant of Smith and Kelly, but the servant of Dixon: Macdonell on Master and Servant, 307 et seq.; *Laugher* v.

Pointer, 5 Barn. & C. 547; *Murphey* v. *Caralli*, 3 Ex. 461; *Kimball* v. *Cushman*, 103 Mass. 194; 4 Am. Rep. 528; *Vary* v. *Chicago etc. R. R. Co.*, 42 Iowa, 246.

Judgment affirmed.

MASTER AND SERVANT — RELATION OF, WHEN EXISTS. — The relation of master and servant exists only when the person sought to be charged as master for the act of the servant either employed or controlled him, or had the right of control over him, at the time the injury sued for happened, or expressly or tacitly assented to the rendition of the particular service by him. He must, at the time, have had the right to direct the action of the servant, and to accept or reject its rendition by him: *Mound City etc. Co.* v. *Conlon*, 92 Mo. 221. For the relation to exist so as to make the master responsible, he must not only have the power to select the servant, but to direct the mode of executing the work, and to so control him in his acts in the course of the employment as to prevent injury to others: *Robinson* v. *Webb*, 11 Bush, 464. He is deemed to be the master who has the superior choice, control, and direction of the servant, and whose will the servant represents, not merely in the ultimate result of his work, but in all its details: *Robinson* v. *Webb*, 11 Bush, 464. Whether or not the relation of master and servant exists so as to invoke the rule of *respondeat superior* depends mainly on whether or not the employer retains the direction and control of the work, or has given it to another person: *Andrews* v. *Boedecker*, 17 Ill. App. 213; for the liability of the master does not reach wrongs caused by the carelessness of servants in work not directed by the master, as, for instance, the business of a third person, or of the servant himself, or of the master, which he did not expressly or impliedly direct him to perform. In other words, the relation of master and servant and the responsibility of the master grows out of, is measured by, and begins and ends with his control of the servant: *Wiltse* v. *State Road etc. Co.*, 63 Mich. 639.

Still, if for his own protection the owner reserves over that which he permits to be used by another the essential powers of a master, he will be held to sustain that relationship when the rights of others, affected by the negligence of those selected, paid, and kept in his employment, are brought in question: *Burton* v. *Galveston etc. R'y Co.*, 61 Tex. 526.

The relation of master and servant does not cease to exist so long as the master reserves any control, or right of control, over the method and manner of doing the work or the agencies by which it is to be affected: *Fell* v. *Rich Hill etc. Co.*, 23 Mo. App. 216.

Prima facie, a person found doing service for another is in the other's employ. If the owner retains the power of controlling the work, the relation existing between him and the person contracted with, so far as the responsibility on the part of the owner for the acts of the person employed is concerned, is that of master and servant. The mere fact that the person employed followed a certain trade or profession, or carried on a separate and distinct employment, does not change the rule: *Perry* v. *Ford*, 17 Mo. App. 212.

An express contract is not essential to create the relation of master and servant. It may be implied from circumstances, so that the master will be liable for the negligence of the servant, though in fact the relation did not exist, as where he induced the belief that the relation existed, and thereby led another to act upon it to his injury: *Growcock* v. *Hall*, 82 Ind. 202.

The relation of master and servant exists where the latter is employed, not by the master directly, but by an employee in charge of a part of the master's business, with authority to engage assistants therein; and the fact that the subordinate servant receives compensation proportionate to the work done does not make any difference: *Rumwell* v. *Dilworth*, 111 Pa. St. 343. And one who, at the request of the man in charge of the work, temporarily assists in the master's work, not expecting remuneration, is for the time being a servant of the master, and entitled to the same protection as any other servant: *Johnson* v. *Ashland Water Co.*, 71 Wis. 553; 5 Am. St. Rep. 243. The fact that a person, who, being in charge of a horse with the assent of the owner, and engaged in his business, causes an injury by negligent riding while in the general employment of a third person will not exempt the owner of the horse from liability for the injury, unless the relation of the third person to the business is such as to give him exclusive control of the means and manner of the accomplishment of the business, and exclusive direction of the persons employed therefor: *Kimball* v. *Cushman*, 103 Mass. 194; 4 Am. Rep. 528; *Preston* v. *Knight*, 120 Mass. 5. If a master sends his servant to deliver a load of coal to the occupants of a store, and such occupants have the right to direct the absolute control and mode or manner of such delivery, then the servant becomes their servant, so as to render them liable for injuries occasioned by his negligence in delivery of the coal: *Clapp* v. *Kemp*, 122 Mass. 481.

A convict is the servant of the person employing him, even if his wages go to the county in which he is imprisoned: *Hartwig* v. *Bay State etc. Co.*, 43 Hun, 425. If the keeper of a prison places a convict in charge to protect his premises from trespassers, the relation of master and servant exists so as to make the keeper liable for an unlawful injury inflicted by the convict: *Ward* v. *Young*, 42 Ark. 542.

Where a regular brakeman is absent, and the safe and proper management of the train requires it, a conductor has authority to employ a brakeman for the time being, who thereby becomes the servant of the company: *Sloan* v. *Central Iowa R'y Co.*, 62 Iowa, 728.

A driver of a street-car who, on being relieved by another driver, immediately leaves the car for the purpose of getting a meal is still the servant of the company, so as to make the latter liable for his gross negligence or carelessness in leaving the car: *Commonwealth* v. *Brockton Street R'y Co.*, 143 Mass. 501. An engine-wiper employed in a railroad company's round-house is still the servant of the company after leaving the house and while passing through the yards on his way to or from work: *Ewald* v. *Chicago etc. R'y Co.*, 70 Wis. 420; 5 Am. St. Rep. 178.

In an action against a railroad company for damages for personal injury inflicted by the employees on a train, it appeared that both the train and the road belonged to the company, although the road had not been formally accepted from the contractor who built it, and that the employees on the train were, at the time of the accident, employed and paid by the company, and could be discharged on complaint of the contractor, it was decided that the relation of master and servant existed between the company and the employees on the train, so as to make it liable for their negligence: *Burton* v. *Galveston etc. R'y Co.*, 61 Tex. 526; *New Orleans etc. R. R. Co.* v. *Norwood*, 62 Miss. 565; 52 Am. Rep. 191. Although a person is not the owner or manager of a steamboat, and has no authority to hire, control, or discharge its employees, still; if it is navigated by him or for him, and the employees are controlled for him by another, he is liable for their negligence: *Fay* v. *Davidson*,

13 Minn. 523. The relation of master and servant exists between father and daughter, where she, being twenty-nine years of age, resides with him, and by a tacit understanding continues to perform domestic duties, and is supplied by him with food and clothing: *Lipe* v. *Eisenlerd*, 32 N. Y. 229. A servant employed by a flour merchant to deliver his goods, who starts with a wagon-load of flour and bran for different customers, and leaves several bags of bran by the roadside while going to deliver the flour, intending to take the bran on his return, and thus gain time to attend to his own private business, must be regarded as acting for the master in leaving the bran, so as to make the latter liable for an injury caused by the fright of a horse in being driven by: *Phelon* v. *Stiles*, 43 Conn. 426.

If the hirer of a team with a driver agrees with the owner that he will furnish his own driver, the latter becomes his servant: *Hofer* v. *Hodge*, 52 Mich. 372; 50 Am. Rep. 256. When a person is injured by the negligent driving of the owner's team by his driver, both team and driver being hired by a third person, who requested the services of that particular driver, the owner is not liable, the driver being at the time the servant of the hirer: *Joslin* v. *Grand Rapids Ice Co.*, 50 Mich. 516; 45 Am. Rep. 54. Where the owner furnishes a driver to manage his team, and the hirer acquires the right to superintend and direct the servant, the latter continues to be the servant of the owner, who is responsible for his negligence: *Ames* v. *Jordan*, 71 Me. 540; 36 Am. Rep. 352; *Huff* v. *Ford*, 126 Mass. 24; 30 Am. Rep. 645. A ferry-man transporting a stage and its passengers across a stream is, as to a passenger contracting with the stage company for transportation only over its route, to be regarded as the servant of the stage company: *McLean* v. *Burbank*, 11 Minn. 277. To the same effect, *Hooper* v. *Wells*, 27 Cal. 11.

If a contractor agrees with the trustees of an estate to take down a building for them under their direction, and subject to their approval, he is their servant, so as to make them liable for his negligence: *Linnehan* v. *Rollins*, 137 Mass. 123; 50 Am Rep. 287. When the owner of a quarry hires a party to go into the quarry to quarry stones therein, break the same to a certain size, and pile them up for measurement, but retains no other or further control over the employee, who furnishes the gunpowder and other tools, and is paid by the perch, the relation of master and servant exists, and the latter is liable for injury inflicted by the employee in destroying adjacent buildings while blasting with gunpowder: *City of Tiffin* v. *McCormack*, 34 Ohio St. 638; 32 Am. Rep. 408. A porter or other employee of the Pullman car company, where the car of such company forms a part of a regular train, is to be regarded as the servant of the company running such train: *Williams* v. *Pullman Palace Car Co.*, 40 La. Ann. 417; 8 Am. St. Rep. 538; *Pennsylvania Company* v. *Roy*, 102 U. S. 451; *Thorpe* v. *New York Central etc. R. R. Co.*, 76 N. Y. 402; 32 Am. Rep. 325. Where, under a contract, a party acts as yard-master and station-agent for a railroad company, with absolute control of the grounds, yards, buildings, engines, cars, and employees furnished by the company, such employees to be paid and controlled by him, and his whole work to be done to the satisfaction of the company's superintendent, who has power to revoke the contract if the work is unsatisfactory, the relation of master and servant exists between the contractor and the company, and the latter is liable for the negligence of the train-men under his control: *Speed* v. *Atlantic etc. R. R. Co.*, 71 Mo. 303.

Shovelers engaged in transferring coal from a vessel at the dock into the cars of a railroad company, the apparatus used being supplied by the company and controlled by its servants, and the shovelers being paid from

money received by the company from the ship-holders for unloading, are the servants of the company: *Daley* v. *Boston etc. R. R. Co.*, 147 Mass. 101. But a stevedore employed to load or unload a vessel for a gross sum is not the servant of the owner of the vessel, so as to make him liable for the negligence of the men employed by the stevedore: *Sweeny* v. *Murphy*, 32 La. Ann. 628; *Pingree* v. *Leyland*, 135 Mass. 398. A pilot, while he has charge of a vessel, is the servant of the owner: *Yates* v. *Brown*, 25 Mass. 23. Still, where a vessel is being towed by a steam-tug, the master and crew of the latter are not the servants of the owner of the former: *Sproul* v. *Hemmingway*, 14 Pick. 1. A farm employee who is to receive a part of the crop as compensation for his services is the servant of the land-owner: *Richey* v. *Dupre*, 20 S. C. 6.

A railroad company, accepting the services of a gateman employed by another company owning the road used by it, thereby recognizes such gateman as its servant, and is liable for his negligence: *Cleveland etc. R'y Co.* v. *Schneider*, 45 Ohio St. 678. One may be the servant of another, so far as a claim for services is concerned, even though at the same time he was in the employ of a third person both in and out of the business hours of the latter: *Wallace* v. *De Young*, 98 Ill. 638; 38 Am. Rep. 108.

The principle of *respondeat superior* applies to municipal corporations, where the acts of their servants refer to powers and duties ministerial in their nature and character: *Toledo* v. *Cone*, 41 Ohio St. 149; *Lloyd* v. *Mayor of New York*, 5 N. Y. 369; 55 Am. Dec. 347; *Conrad* v. *Ithaca*, 16 N. Y. 158; but a public officer elected or appointed in a city to perform public duties prescribed by statute, and not for the benefit of the city in its corporate capacity, is not the servant of the town so as to make the latter liable for his negligence: *Hafford* v. *New Bedford*, 82 Mass. 297; *Dunbar* v. *Boston*, 112 Mass. 75; *Alger* v. *Easton*, 119 Mass. 77.

A newsboy permitted to pass in and out of street-cars, but not in the employ of the company, is not the servant of the company: *Philadelphia Traction Co.* v. *Orbann*, 119 Pa. St. 37. So a postal-clerk is not the servant of the company on whose train he runs: *Muster* v. *Chicago etc. R. R. Co.*, 61 Wis. 325; 50 Am. Rep. 141. A licensee of the exclusive privilege of entering trains for the purpose of selling and supplying lunches to passengers is not the servant of the railroad company: *Fluker* v. *Georgia R. R. etc. Co.*, 81 Ga. 461; 12 Am. St. Rep. 328. A store-keeper who sells merchandise, and then permits or directs the purchaser's servant to remove it by throwing it from an upper window into the street, does not, by so doing, make the servant his servant so as to be liable for his act: *McCullough* v. *Shoneman*, 105 Pa. St. 169; 51 Am. Rep. 194. A landlord is not liable to a servant of the tenant for an injury resulting from the negligence of the latter, unless it arose from some unperformed duty remaining upon the landlord, even though the servant was originally his servant, was ignorant of the lease, and supposed himself still in the employment of the landlord: *Crussells* v. *Pugh*, 67 Ga. 430; 44 Am. Rep. 724. When a master sends his servant to deliver a load of merchandise to a customer at a distance, and upon his arrival the customer requests him to take the merchandise to another person, at a considerable distance farther on, and while there get some freight, and bring it to him, while so engaged the servant is not in the employ of the first master so as to make him liable for his negligence: *Stone* v. *Hills*, 45 Conn. 44; 29 Am. Rep. 635. If a clerk is in the employment of a merchant, and the latter, with another, forms a partnership in the same business, after which the clerk enters into the service of the firm, his employment with the first master is

at an end, and upon receiving the wages due up to the time of the formation of the partnership, and a refusal to work without an increase in salary, he cannot, upon being discharged, recover from the original employer: *Anderson* v. *Freeman*, 75 Ga. 93. A police-officer is not the servant of the city appointing him, so as to exonerate it from liability for injury sustained by him because of a defective highway: *Kimball* v. *Boston*, 1 Allen, 417.

One who contracts with another to do a specific piece of work for him, which work is lawful in its nature, and who furnishes and has the absolute control of his assistants, and who executes the work entirely in accord with his own ideas, or with a plan previously given him by the person for whom the work is done, without being subject to the latter's orders in respect to the details of the work, with absolute control thereof, is not a servant of his employer, but is an independent contractor, and a person injured by his negligence in the performance of the work has no right of action against the party for whose benefit the work is done. In other words, neither an independent contractor nor his assistants are the servants of the party with whom he contracts, and the only question to be determined in fixing the liability is as to who has the control of those employed in the work, and control of the manner in which it is done. If one contracts with another to perform lawful work without reserving any control of those employed in the work, or the manner in which it is to be done, the contractor who controls and directs those engaged in the work, and not the party for whom it is done, is the master, and liable for their negligence. If, however, the party for whom the work is done reserves such control, he is liable as the master. To this effect the authorities are numerous and harmonious. Among them are *St. Louis etc. R'y Co.* v. *Yonley*, 53 Ark. 503; *Hale* v. *Johnson*, 80 Ill. 185; *West* v. *St. Louis etc. R. R. Co.*, 63 Ill. 545; *Wray* v. *Evans*, 80 Pa. St. 102; *Reed* v. *Allegheny City*, 79 Pa. St. 300; *Edmundson* v. *Pittsburgh etc. R. R. Co.*, 111 Pa. St. 316; *Smith* v. *Simmons*, 103 Pa. St. 32; 49 Am. Rep. 113; *Miller* v. *Minnesota etc. R'y Co.*, 76 Iowa, 655; 14 Am. St. Rep. 258; *Brown* v. *McLeish*, 71 Iowa, 381; *Du Pratt* v. *Lick*, 38 Cal. 691; *Powell* v. *Construction Co.*, 88 Tenn. 692; *McCafferty* v. *Spuyten Duyvil etc. R. R. Co.*, 61 N. Y. 178; 19 Am. Rep. 267; *Coughty* v. *Globe Woolen Co.*, 56 N. Y. 124; *New Orleans etc. R. R. Co.* v. *Reese*, 61 Miss. 581; *Robinson* v. *Webb*, 11 Bush, 464; *Fuller* v. *Citizens' Bank*, 15 Fed. Rep. 875; *Hitte* v. *Republican Valley R. R. Co.*, 19 Neb. 620; *Bennett* v. *Truebody*, 66 Cal. 509; 56 Am. Rep. 117; *Bailey* v. *Troy etc. R. R. Co.*, 57 Vt. 252; 52 Am. Rep. 129; *Fink* v. *Missouri Furnace Co.*, 82 Mo. 276; 52 Am. Rep. 376; *Carter* v. *Berlin Mills*, 58 N. H. 52; 42 Am. Rep. 572; *McCarthy* v. *Second Parish of Portland*, 71 Me. 318; 36 Am. Rep. 320.

One who voluntarily undertakes to perform services for another, who assents thereto, stands in the relation of servant to the latter while so engaged: *Barstow* v. *Old Colony R. R. Co.*, 143 Mass. 535; *Union R'y etc. Co.* v. *Kallaher*, 114 Ill. 325.

SAVANNAH STREET RAILROAD COMPANY *v.* BRYAN.

[86 GEORGIA, 312.]

MASTER AND SERVANT — MASTER'S LIABILITY FOR VIOLENCE OF SERVANT. — A railroad company is liable for the unlawful violence and misbehavior of its employees, both on the cars and at the office of the company. The rule is here applied to a battery committed by a conductor upon a passenger on the car, and repeated afterwards at the company's office.

Lawton and Cunningham, and E. S. Elliott, for the plaintiff in error.

Garrard and Meldrim, for the defendant in error.

BLECKLEY, C. J. The jury found for the plaintiff below two thousand dollars. The motion for a new trial complains of no error by the court, but attacks the verdict as contrary to law, to evidence, etc., and as excessive in amount. The motion was overruled. This was an approval of the verdict by the presiding judge.

Treating the testimony of the plaintiff and his witnesses as reliable, and as presenting the whole truth of the case, there can be no doubt that the verdict was warranted in all respects. The plaintiff, being a passenger on a street-car, was called upon by the conductor for his fare. He had money in his pocket, and telling the conductor to wait a minute, was feeling for a nickel, when he was seized by the conductor, and ordered off the car. A struggle ensued, and the conductor kicked him off the platform, the car being in rapid motion. The plaintiff then repaired immediately to the office of the company for the purpose of making complaint to the superintendent. He reached the office in about eighteen or twenty minutes. The conductor arrived at or near the same time. The conductor cursed him, kicked him again twice, hit him with his fist, and shoved him away. Others present took part with the conductor, and plaintiff was badly beaten. The conductor plunged a knife into him. His left arm was broken, and the cut with the knife was in the back of the head. He became unconscious, and was afterwards picked up by a policeman some two blocks distant from the office. He could not say exactly where and at what time he was cut, but he saw the conductor, while on the platform of the office, draw a knife from his pocket, and open it with his teeth. The evidence adduced by the company conflicted with this account in several material respects, but that conflict counts for nothing on this writ of error, the jury having found in favor of the

plaintiff, and their finding having been approved by the presiding judge. The company is responsible for the unlawful violence and misbehavior of its employees, both on the cars and at the office: *Gasaway* v. *Atlanta etc. R. R. Co.*, 58 Ga. 216; *Peeples* v. *Brunswick etc. R. R. Co.*, 60 Ga. 281; *Western and Atlantic R. R. Co.* v. *Turner*, 72 Ga. 292; 53 Am. Rep. 842; *City and Suburban R'y Co.* v. *Brauss*, 70 Ga. 368; *Christian* v. *Columbus etc. R'y Co.*, 79 Ga. 460.

There was no error in denying the motion for a new trial. Judgment affirmed.

MASTER AND SERVANT — LIABILITY OF MASTER FOR SERVANT'S TORTS. — The master is liable for the torts of his servant committed in the course of his employment: *McClung* v. *Dearborne*, 134 Pa. St. 396; 19 Am. St. Rep. 708, and note. This rule is applied to an assault and battery committed by a railway conductor upon a passenger on a railway train: *Dillingham* v. *Russell*, 73 Tex. 47; 15 Am. St. Rep. 753, and note. In *Brazil* v. *Peterson*, 44 Minn. 212, where a barkeeper of a saloon assaulted a person who was in the saloon in an intoxicated and helpless condition, the court decided that the proprietor of the saloon was liable. A master cannot be held responsible for the acts of a servant done in violation of his orders and beyond the scope of his employment: *Andrews* v. *Green*, 62 N. H. 436.

BENNETT *v.* STATE.

[86 GEORGIA, 401.]

CRIMINAL LAW — CHARACTER — PRESUMPTION IN ABSENCE OF PROOF. — An accused is not bound to put his character in issue. His omission to do so, or to show good character, does not justify a presumption that his character is bad, from which an inference of guilt can be drawn.

CRIMINAL LAW — CHARACTER — PRESUMPTION. — The character of a party accused of crime is presumed to be good, until the contrary is proved.

CRIMINAL LAW — CHARACTER. — GUILT OF ACCUSED must be proved beyond a reasonable doubt, whether his character is good or bad.

CRIMINAL LAW — CHARACTER — COMMENTS OF COUNSEL. — It is reversible error to allow counsel for the prosecution to argue, against objection, that want of testimony as to the character of the accused authorizes the jury to infer that his character is bad, although his counsel, in argument as to his good character, has gone outside the evidence.

McCurry and Proffitt, for the plaintiff in error.

W. M. Howard, solicitor-general, and Harrison and Peeples, for the state.

SIMMONS, J. Bennett was tried for the offense of burglary, and was convicted. He made a motion for a new trial, which was refused, and he excepted. One of the grounds of the

motion is, that the prosecuting attorney, in the closing argument, argued that the defendant had a bad character; that he had a right to prove his good character, and had not done so. The defendant objected to this, and requested the court not to allow it. The court stated that the argument was proper, and he would allow it to proceed. Following is a note which the court attaches to this ground: "The first ground of the motion for new trial is true, with the following additional statement in connection with what occurred and in explanation thereof: In his argument before the jury, defendant's counsel had stated and reiterated repeatedly,— 1. His personal conviction that the defendant was an honest man and a man of good character, and that nothing criminal had ever before been charged against him; 2. That the defendant was a man of as good a character as Bowers, one of the state's witnesses, and stood as well in the community as Bowers did; 3. That Duncan, a witness for the state, was a man of good character, and had employed defendant for six years, and that Duncan would not have done so if defendant was a thief; and 4. That defendant stood well among his neighbors, and was regarded where he lived as an honest man and one of good character, so far as the evidence in this case disclosed. In replying to these arguments, the solicitor-general said, in doubtful cases, in cases where the state had proved many suspicious facts and circumstances against a defendant, the law allowed him to prove his good character, and that if this defendant was a man of such good character and reputation as his counsel had insisted he was, why had he not called some of his neighbors to prove his good character? and that his failure to do so must be because he had no such good reputation. When the point was made that this argument was improper, the court refused to interrupt the solicitor-general, because of the fact that defendant's counsel had made the statements above mentioned."

We think the court erred in allowing the state's counsel to argue before the jury, after objection by the prisoner's counsel, that the defendant's character was bad because he had a right to prove his good character and had not done so. The accused is not bound to put his character in issue. If he omits to do so, no inference of his guilt can be drawn therefrom by the jury. The general rule is, that the omission to show good character does not justify a presumption that the character is bad, from which an inference of guilt can be

drawn: *People* v. *Bodine*, 1 Denio, 281; *Ackley* v. *People*, 9 Barb. 609; *State* v. *Dockstader*, 42 Iowa, 436; *State* v. *O'Neal*, 7 Ired. 251; *State* v. *Upham*, 38 Me. 261; *Stephens* v. *State*, 20 Tex. App. 255; *People* v. *White*, 24 Wend. 520; *Donoghoe* v. *People*, 6 Park. Cr. 120; *Cluck* v. *State*, 40 Ind. 270; *Fletcher* v. *State*, 49 Ind. 134; 19 Am. Rep. 673; 1 Bishop's Crim. Proc., sec. 1119.

The state is bound to prove the guilt of a defendant beyond a reasonable doubt, whether his character has been good or bad. It does not follow because an accused person may have a bad character, that he is guilty of the particular offense for which he is being tried. Counsel, both for the state and the accused, should be compelled by the court to confine themselves in their arguments to the evidence in the case. In this state, the defendant has a right to make a statement of his defense to the jury, and it has been held in several cases that the state's counsel, where the defendant omitted to make such statement, had no right to argue that fact to the jury. Nor can the jury infer guilt from the defendant's omission to make the statement. If the state's counsel is not allowed to argue this fact to the jury, why should he be permitted to argue that the omission to prove good character is evidence of bad character? Why should the jury be permitted to infer that his character is bad because he has omitted to prove good character?

The trial judge, however, certifies that he permitted the state's counsel to make this argument because the prisoner's counsel had argued to the jury that the prisoner had a good character, etc.; meaning thereby that as the prisoner's counsel had argued to the jury a fact which was not in evidence, it was proper to allow the state's counsel to reply to that argument, and to say that the prisoner's character was bad because he had a right to prove good character and had failed to do so. In *State* v. *Upham*, 38 Me. 261, the indictment charged the accused with having in his possession counterfeit bank bills. He offered no evidence of his general good character, but his counsel argued to the jury that from his position in society as postmaster, his character ought to avail him in aid of the common presumption of innocence. Counsel for the government argued that the want of such testimony authorized the jury to infer that his character was bad. Refusal of the court to instruct the jury, upon request, that the failure to offer such proof afforded no inference of guilt, or that the character was not good, was held error.

There are many authorities which hold that the law presumes that a defendant has a good character. This was held in the case of *Stephens* v. *State*, 20 Tex. App. 269; and in the case of *Cluck* v. *State*, 40 Ind. 270, the supreme court of Indiana held that the law presumes that every man has a good character, and that it would have been competent for counsel to have commented on such presumption. This rule is also laid down in Sackett on Instructions to Juries, 651. In the case of *Goggans* v. *Monroe*, 31 Ga. 331, the defendant's counsel, in his argument, insisted that the plaintiff's character was bad; whereupon counsel for the plaintiff requested the court to charge the jury that the law presumed the plaintiff to be of good character, until the contrary was shown by proof. The trial judge refused to charge as requested, and this court held that "it was error in the court to refuse to charge, on request, that the law presumes the character of the party to be good, until the contrary is proven." Jenkins, J., in delivering the opinion, said: "Defendant's counsel having argued that plaintiff's character was bad, and this argument being likely to prejudice his case before the jury, he was entitled to the legal presumption that in the absence of evidence proving the contrary, his character was good; and it was error in the court to refuse to charge, on request, that the law did so presume."

But whether this be true or not, we hold that the court erred in allowing the state's counsel, over the objection of the prisoner's counsel, to make this argument to the jury, although the latter had first violated the rules of court by going outside of the evidence. The fact that the prisoner's counsel had violated the rule would not authorize the state's counsel to do likewise. To hold that because counsel on one side violates a rule of court in his address to the jury by making statements outside of the evidence, the opposing counsel has the right to violate the rule in like manner, over objections of opposing counsel, would be to turn a court, where justice should be administered according to the rules of evidence and of law, into a town meeting. We could as well hold that if the prisoner's counsel introduces illegal evidence, the state's counsel can reply by introducing other illegal evidence; and this, we have held, cannot be done: *Woolfolk* v. *State*, 81 Ga. 551. In the case of *Mitchum* v. *State*, 11 Ga. 615, one of the grounds of the motion for a new trial was, that the court erred in allowing the solicitor-general, in the concluding argument, although objected to by counsel for the accused, to support the

testimony of Eilands by stating that he was an unwilling witness for the state, that he had refused to come under subpœna, and was brought by arrest under attachment, none of which was in evidence before the jury, the court remarking that it was allowable because B. K. Harrison, one of the defendant's counsel, in his argument to the jury, had stated that Eilands was locked up on the sabbath before the trial, with the father-in-law of the deceased, and the prosecutor, drinking with them, none of which was in evidence, Mr. Harrison contending that Eilands was a willing and a bribed witness. In the opinion, page 628, Nisbet, J., in dealing with this ground, said: "The seventh exception is founded on the refusal of the court to restrain the solicitor-general, although requested so to do by counsel for the prisoner, from commenting on facts not in evidence, in his concluding speech to the jury. This, we think, was an error. We have had occasion to consider the habit of counsel in addressing the jury, of commenting upon matters not proven and not growing out of the pleading, before, and have been content with visiting it with a decided and emphatic disapproval: *Berry* v. *State*, 10 Ga. 522, 523. We entertain no shadow of doubt as to the necessity of pronouncing it, as we now do, illegal and highly prejudicial to a fair and just administration of the rights of parties, either on the criminal or civil side of the court. It is the duty of the court to prevent such comments, and in all cases where this is not done, provided the court is requested to prevent them, we shall hold, as we rule in this case, that it is good ground for a new trial. There was, it is true, some excuse for the license conceded to the solicitor-general in this case, in the fact that counsel for the prisoner had already taken the same liberty in his argument to the jury. The solicitor-general, no doubt, felt called upon by the obligations of his office to remove any wrong impression which the argument of counsel for the prisoner had made as to the credibility of the witness. Disregarding, however, these things, we have no option but to make this case the occasion of establishing a rule upon this subject. In doing this, I am sure that it is scarcely necessary to say that we disclaim any purpose of inflicting a personal censure upon the able and upright judge who presided in the cause, or upon the counsel and the prosecuting officer. If no other reason existed for this disclaimer (and there are many), sufficient reason would be found in the usage of our courts, which has gone very far to sanction the habit referred to. Its practical tendency is bad

upon the court, the bar, and the jury. If this were all, perhaps our duty would stop with the expression of such an opinion; but this is not all, for, in our judgment, it is violative of the rights of the citizen litigant in the courts of justice; and if so, we are not at liberty to stop short of making it cause for a new trial." See also, upon the same line, *Tucker* v. *Henniker*, 41 N. H. 317; *State* v. *Upham*, 38 Me. 261; *Hennies* v. *Vogel*, 87 Ill. 242; *Fox* v. *People*, 95 Ill. 71; *Rochester* v. *Shaw*, 100 Ind. 268; *Forsyth* v. *Cothran*, 61 Ga. 278; *Johnson* v. *Slappey*, 85 Ga. 576; *Augusta etc. R'y Co.* v. *Randall*, 85 Ga. 298; *Commonwealth* v. *Scott*, 123 Mass. 239; 25 Am. Rep. 87; *McDonald* v. *People*, 126 Ill. 150; 9 Am. St. Rep. 547, and note.

The proper practice, according to the majority of the cases above cited, would have been for the prisoner's counsel to have requested the court to charge the law contrary to that as asserted by the solicitor-general in his address to the jury. The record shows, however, that he did object to the remarks of the solicitor-general, and requested the court to stop him, but that the court refused to do so, holding that the remarks were proper, and thereby giving the jury to understand that the rule of law laid down by the solicitor-general was the correct one, and that they might make the inferences claimed by the prosecuting officer. Under this state of facts, it was scarcely necessary for the prisoner's counsel to request the court to charge a contrary view of the law. This being a very close case on the facts, and the language of the state's counsel being calculated to prejudice the jury against the defendant, we reverse the judgment of the court below in refusing to grant a new trial upon this ground.

Judgment reversed.

CRIMINAL LAW — CHARACTER OF ACCUSED — PRESUMPTION. — While the law presumes every one innocent, it does not presume any one to have a good character: *Danner* v. *State*, 54 Ala. 127; 25 Am. Rep. 662.

CRIMINAL LAW — REASONABLE DOUBT. — The guilt of an accused must be established beyond a reasonable doubt: *Linton* v. *State*, 88 Ala. 216; *Lowe* v. *State*, 88 Ala. 8; *People* v. *Ferry*, 84 Cal. 31; *Sheehan* v. *People*, 131 Ill. 22; *State* v. *Bush*, 122 Ind. 43; *State* v. *Rainsbarger*, 79 Iowa, 746; *People* v. *Cox*, 70 Mich. 247; *State* v. *Whalen*, 98 Mo. 222; *State* v. *Howell*, 100 Mo. 628; *State* v. *Elliott*, 98 Mo. 151; whether his character is good or bad: *Hussey* v. *State*, 87 Ala. 122; *People* v. *Bowman*, 81 Cal. 566.

CRIMINAL LAW — ARGUMENT OF COUNSEL. — As to the effect of comments made by the state's attorney with respect to a failure of the accused to testify or produce evidence on his own behalf, see note to *State* v. *White*, 27 Am. Rep. 142–144; *Hunt* v. *State*, 28 Tex. App. 149; 19 Am. St. Rep. 815, and note; note to *McDonald* v. *People*, 9 Am. St. Rep. 567.

HORAN *v.* STRACHAN.

[86 GEORGIA, 408.]

SHIPPING — CONTRACT OF HIRING — RECOVERY FOR BREACH. — Where the master of a vessel engages a person to take charge of it, extinguish a fire on board, and protect the cargo, this constitutes a contract of hiring, and not an agency. The person so employed is entitled to complete his part of the contract, and if previously discharged by the owner of the vessel without cause, may recover against him for the breach of the contract.

SHIPPING — CUSTOM OF PORT, WHEN PART OF CONTRACT. — Where the master of a vessel in distress employs a person to extinguish a fire on board and protect the cargo, with knowledge of and contracting in reference to a reasonable custom of port to charge custody, commission, and attendance fees, the owner of the vessel is bound by such custom.

SHIPPING — CUSTOM OF PORT, VALIDITY OF. — A custom of port that one employed to take charge of a vessel in distress, for the purpose of saving it and its cargo, is entitled to charge a custody commission and reasonable attendance fee is not invalid because it does not fix the attendance fee in every case.

SHIPPING — COMMISSION ON DISBURSEMENTS. — One who is employed by the master of a vessel in distress to save it and its cargo is not entitled to commissions on disbursements, when such disbursements are made by somebody else, and in the absence of proof of the existence of a custom to that effect brought to the notice of the master, and that the person employed had the money for that particular purpose, or had made arrangements to procure it for such purpose, and had thereby incurred expense.

CUSTOM, EFFECT OF LOCAL AND GENERAL. — When a custom is general, every person who makes a contract is presumed to know the custom, and it enters into the contract and binds him. When, however, a custom is local, a person who resides in a foreign land, and has never been to the particular locality before, is not bound, unless he has knowledge of the custom.

CUSTOM, PROOF OF. — The existence of a custom cannot be proved by the opinions of witnesses that it ought to exist. Its existence must be proved as a fact.

George A. Mercer, for the plaintiff in error.

Garrard and Meldrim, for the defendants in error.

SIMMONS, J. Strachan & Co. sued James Horan, the owner of the British steamship Resolute, on an account upon a bill of particulars attached to the declaration, the said account being made up of the charge of two and one half per cent commission, commonly known as "custody commission," upon the value of the cargo discharged, covering services rendered and work and labor done in and about the steamship Resolute, in the port of Savannah, and also an attendance fee of $500, and also a commission on disbursements of the ship of two and a

half per cent thereon, the whole amounting to $4,975. There were other counts in the declaration for work and labor done, and also a *quantum meruit*. The defendant appeared and pleaded the general issue. It appears from the record in this case that about five o'clock in the morning, October 1, 1887, the steamship Resolute, then loaded with 5,003 bales of cotton, had cleared for sea, and while she was taking on coal preparatory for leaving the harbor, a fire broke out aboard ship. The plaintiffs, who were then doing business in the city of Savannah as shipping merchants, were sent for by the master of the vessel, and Strachan, the senior member of the firm, responded, went aboard the vessel and reported to the master, and then and there the vessel and her cargo were put in charge of said firm, just as vessels in distress are usually put in charge of merchants in that port. The testimony shows that after Strachan had superintended the discharge of the cargo from the ship for some two hours, they adjourned to the cabin to talk over the condition of affairs. The captain swore: "I asked Strachan if there would be any extra fees charged in connection with this matter. He replied, a custody commission had always been paid in similar cases. I said I considered I required an agent, and if such was the charge I considered he deserved the preference, being my outward agent. He and I at the time never anticipated that the whole of the cargo would be discharged, but were in hope of extinguishing the fire in a very short time. I then found I required a wharf to land the cargo that was discharged, and requested Strachan to secure one on the most reasonable terms. Strachan & Co. continued to act as my agents until Monday afternoon, October 3, 1887, when I received a telegram from Chubb, my owner's special agent, to the effect to withdraw the agency from Strachan & Co., unless they would waive their custody commission fee, etc." Strachan swore that he was employed by the master of the vessel early in the morning on the 1st of October, the ship being then flooded with water in attempting to extinguish the fire in the cargo, and that he immediately went to work to assist the captain in every way possible, and that when he went to the cabin and got breakfast he explained to the captain that by appointing him agent there were certain customary charges, such as custody commission of two and one half per cent and attendance fee for managing this business, to accrue; and the captain said: "Very well, if it was the custom of the port he could not help it, and as Strachan was the agent of the ship

before, it would be better for him to attend to the business than any one else." A great deal of other testimony was put in by the plaintiffs and the defendant under the *quantum meruit* count; also testimony going to show the custom of the port of Savannah as to the custody commission, attendance fee, and commission on disbursements. The testimony upon the last item will be given more fully hereafter in this opinion. The jury returned a verdict for the plaintiff, and the defendant made a motion for a new trial upon many grounds, which was overruled by the court, and the defendant excepted.

The main and controlling questions argued before us were,— 1. Did the captain of the vessel, under the instructions from Chubb the underwriter, approved by Horan the owner, have a legal right to discharge Strachan & Co. from his employment without sufficient cause? and 2. Was Horan, the owner, bound by the custom of the port of Savannah in regard to custody commission, attendance fee, and commission on disbursements?

1. As to the first question, it was contended by counsel for the plaintiff in error that Strachan & Co., being simply agents of the owner of the vessel, might be discharged at any time, at the option of the principal or owner; in other words, that their agency could be revoked by the principal whenever he saw proper to do so, such agency not being coupled with an interest. While we admit this to be the general law as applied to agents who represent the principal in and about his business, we do not think it applies under the facts of this case. The employment of Strachan & Co., under these facts, was something more than the appointment of an agent. It was more in the nature of an employment or hiring than an appointment to an agency. It was in the nature of a contract between the captain of the vessel, as the owner's agent, and Strachan & Co., whereby the latter agreed to extinguish the fire, and if necessary unload the vessel of its cargo, and do any and every thing else for the protection of the vessel and cargo. They were employed to do a particular thing, and were contractors, instead of agents, in the general understanding of agency. Strachan & Co., therefore, being contractors, servants, or hirelings of Horan to do this particular job, Horan, in our opinion, could not rightfully discharge them without sufficient cause. If a man's house is on fire, and he employs another to extinguish the fire and save the house, he cannot rightfully discharge the person employed for this purpose,

unless there is sufficient cause. Or if he employs one to build him a house, or cut a ditch, or make him a road, he cannot discharge him without sufficient cause. If he should do so, it would be a breach of the contract. Yet, according to the contention of counsel for the plaintiff in error, under the particular facts of this case, all those persons would simply be the agents of the employer, and he could discharge them without a breach of his contract, and they would only be entitled to compensation for the services performed up to the time of the discharge. We cannot agree with counsel in this view of the law. When the steamship was found to be on fire, and the captain sent for Strachan & Co., and requested them to take charge of the ship, and extinguish the fire and protect the cargo, and Strachan & Co. agreed to do so, and accordingly proceeded to do so, in our opinion, it was a contract between them, and Strachan & Co. were entitled to continue in the performance of their part of the contract until its completion; and if they were discharged without cause, it was a breach of the contract, and they would be entitled to recover; and the trial judge having taken this view of the case in his charge to the jury, there was no error in the charges given upon this subject, nor in his refusal to charge as requested by the defendant.

2. This brings us to the question, What were they entitled to recover? Strachan & Co. insist that under the custom of the port of Savannah they were entitled to recover a custody commission of two and one half per cent on the value of the cargo discharged, a reasonable attendance fee on surveys and general supervision, and a commission of two and one half per cent on disbursements connected with the business of the ship in distress. The plaintiff in error, Horan, insists,— 1. That there was no such custom in the port of Savannah; 2. That if there is such a custom, it is an unreasonable custom; and 3. That the captain of the vessel, the agent of the plaintiff in error, did not know of the custom.

As to the custody commission and attendance fee, and the knowledge of the captain in regard thereto, the evidence clearly shows that there was such a custom in Savannah, and that the captain knew it, and contracted with reference to it. It will be remembered, from the recital of facts above given, that when Strachan had been in charge of the vessel about two hours, he went down to the cabin to breakfast with the captain, and then informed him that "by appointing him

[Strachan] agent, there were certain customary charges, such as custody commissions of two and one half per cent, and attendance fee for managing this business, to accrue"; and the captain said, "Very well, if it was the custom of the port, he could not help it"; and that as Strachan had been agent of the ship before, it would be better for him to attend to the business than any one else. The captain does not deny this statement of Strachan, but what he says goes to confirm it. It is therefore clear to our minds that the captain fully understood that there was a custom in Savannah, and the amount of the custody commission, and assented to the custom. As said before, we think the evidence clearly establishes that there was such a custom as to custody commission and attendance fee; and taking into consideration the skill and experience required, and the responsibility incurred in such employment, as shown by the evidence, we cannot say that the custom is an unreasonable one. It must require great skill to manage a vessel loaded with cotton when on fire. If by negligence or a mistake which a skillful person would not make, injury is sustained by the vessel or cargo, the person employed would be liable therefor; and in case of serious loss or injury, the damages would be heavy. And we suppose that the custom fixed these fees in view of the risk and responsibility assumed by the person employed.

It was argued, however, by counsel for the plaintiff in error, as to the attendance fee, that it was unreasonable because the custom did not fix it in every case. There was no custom as to any certain amount, but it was left to the discretion of the person employed, and counsel claims that according to this custom, when the person employed fixes the amount, it is final. We think the evidence shows that although the custom did not fix the fee, it must be a reasonable fee. In our opinion, a custom is not invalid because it does not fix the amount of the fee for every case. If the custom is certain that it must be a reasonable attendance fee, that is sufficient. If custom had undertaken to fix the same fee for every case, it would not have been a good custom. The jury found three hundred dollars to be a reasonable attendance fee upon the steamship Resolute, loaded with 5,003 bales of cotton. That would have been an unreasonable fee in the case of a small schooner loaded with fish or oysters, or with ballast. If the custom is that it shall be a reasonable fee, that is sufficient to render it a reasonable custom. Nor is the owner of the vessel abso-

lutely bound by the fee fixed by the person employed. If it is unreasonable, he can resist it, as the defendant did in this case, and the jury may reduce the amount to what the proof shows to be reasonable, as was done in this case.

3. It will be observed that in our discussion thus far we have omitted the third item of the charges, to wit, two and one half per cent commission on disbursements. On this subject the evidence discloses the fact that Strachan & Co. were discharged on the 4th of October, and that they did not make any disbursements for the vessel, and that all the disbursements were made by other parties. The evidence further discloses that in the conversation between Strachan and the captain of the vessel, when the latter asked as to the fees, Strachan did not mention this item, but only called attention to the custody commission and the attendance fee. There is no evidence going to show that the captain's attention was called to this item of expense, or that he knew that the custom in Savannah required him to pay it. The court therefore, we think, erred in charging the jury that "if they should find that, at the time of making the contract of agency with plaintiffs, the custom of the port of Savannah claimed to exist was not known to the captain of the vessel, and that after that time he was notified of it and informed of it, and did not rescind at once, but allowed and ratified and confirmed the contract, then the jury would find necessarily that he knew it; but he would have had the right then to have said, 'I do not confirm the contract, except provisionally; I will ascertain whether it will go'; and under the circumstances he would have had the right to have said, 'I claim I know nothing of this; I will have to consult with my owners, and we will let it stand in abeyance until we find out, and then we will let it go on.' That would be right, and that would be proper." This charge, under the facts of this case, may have been correct as to the custody commission and attendance fee, for, as we have seen, they were mentioned to the captain of the vessel; but it could not be correct as to the item under consideration, for the evidence shows that the captain was not informed of it, and therefore did not contract with reference to it. If the law is, as seems to have been intimated by the court in this charge, that it was necessary, as to a purely local custom, for a stranger to the locality to have knowledge of it before he would be bound thereby, then it is quite certain that, under the evidence, the captain had no such knowledge. We are inclined to think

that the trial judge took the correct view of the law on this subject. Where a custom is universal or general, every person who makes a contract is presumed to know the custom, and it enters into the contract and binds him; but we are inclined to think that where it is a purely local custom, like this, a person who resides in Europe, and who, so far as the evidence discloses, has never been to the particular locality before, is not bound, unless he has knowledge of the custom: Carter on Carriage by Sea, 184; *Gabay* v. *Lloyd*, 3 Barn. & C. 793; *Hathesing* v. *Laing*, L. R. 17 Eq. 92. See 1 Smith's Lead. Cas., pt. 2, p. 962, American note to *Wigglesworth* v. *Dallison*, and cases cited.

Moreover, this part of the custom was not as well proved as was the custom in regard to the other items. None of the witnesses cite any instance where commissions on disbursements were charged and allowed to one who did not furnish the money. It is true that most of the witnesses gave it as their opinion that the person in charge of the ship would be entitled to the commission, whether he furnished the money and made the disbursements or not; but custom is not a question of opinion, but of fact, and cannot be proved by the opinion of witnesses that it ought to be so and so; it must be proved that the custom exists, — that it is a fact. The court and jury cannot act upon the opinion of the witnesses; they must be guided by that which has been the practice, and no witness testified to any instance where the agent had received these commissions when he had not furnished the money and the money was furnished by the owner: *Read* v. *Rann*, 10 Barn. & C. 439; 21 Eng. Com. L. 189; American notes to *Wigglesworth* v. *Dallison*, 1 Smith's Lead. Cas., pt. 2, p. 962, and authorities there cited.

Besides, we think if the custom had been proved, it would not have been a good custom, and could not have been enforced by law, unless the plaintiff went further, and proved that he had the money and kept it for that particular purpose, or had made arrangements to procure the money for that purpose, and thereby incurred expense. It seems to us it would be absurd to hold that a person is entitled to two and one half per cent commission on disbursements which he never made, and did not have the money to make, and had made no arrangements to procure the money to make, and which disbursements were made by the owner of the vessel, or some one else for him. We think, therefore, that the court erred in giv-

ing the charge above set forth, as to this particular item, and that the jury found contrary to law and the evidence in finding a verdict for this commission, on money which the plaintiffs had not disbursed, and which they had made no arrangements to disburse.

4. The court did not err in overruling the objections to the admissibility of the letters of Horan to the plaintiff, and the surveys made in pursuance of the call of the British vice-consul at Savannah, upon the grounds taken therein and stated in the motion for a new trial, to wit, that the testimony was irrelevant because the letters were written and the surveys made after the revocation of the agency. The surveys, if otherwise unobjectionable (as to which we express no opinion), were not inadmissible on the ground taken in the objection.

The court having erred in its charge as to the commission on disbursements, and the jury having found $687.50 as commission on disbursements of $27,500 at two and one half per cent, we reverse the judgment of the court below in refusing a new trial upon this ground; but if the defendants in error will, within thirty days after this judgment is made the judgment of the court below, write off said sum of $687.50, then the judgment will stand affirmed.

Judgment reversed, with direction.

MASTER AND SERVANT. — As to when the relation of master and servant exists between two persons, see *Brown* v. *Smith*, 86 Ga. 274, *ante*, p. 456, and note 459–463; *Coots* v. *City of Detroit*, 75 Mich. 628; *Rogers* v. *Railroad*, 31 S. C. 378; *Hanna* v. *Railway Co.*, 88 Tenn. 310; *Schrubbe* v. *Connell*, 69 Wis. 476.

CUSTOM, WHEN FORMS A PART OF CONTRACT. — A usage, if known to the parties to a contract to which it relates, is obligatory, and unless excluded by the terms of the contract, enters into and forms a part thereof, as much as though it had been written therein: *First Nat. Bank* v. *Fiske*, 133 Pa. St. 241; 19 Am. St. Rep. 635, and note; *Crane L. Co.* v. *Lumber Co.*, 79 Mich. 308; *Samuels* v. *Oliver*, 130 Ill. 73; *Clark* v. *Hall etc. L. Co.*, 41 Minn. 105; *Patterson* v. *Crowther*, 70 Md. 125; *Ambler* v. *Phillips*, 132 Pa. St. 167.

HARDY v. WILLIAMSON.

[86 GEORGIA, 551.]

LIBEL. — NEWSPAPER PUBLICATION CHARGING A COLLUSION AND COMBINATION between a brick company and its subcontractors and the subordinate engineers of a construction company, or some of them, to cheat, swindle, and defraud the construction company, is libelous, and one of such subordinate engineers may maintain an action thereon, upon proof that the publication referred especially to and was specially defamatory of him.

LIBEL. — NEWSPAPER PUBLICATION CHARGING MORAL TURPITUDE is libelous and actionable, although no specific crime is charged. Charges made of one in reference to his trade, office, or profession, calculated to injure him therein, are actionable, and no special damages are necessary to support the action.

LIBELOUS NEWSPAPER PUBLICATION AGAINST "SUBENGINEERS, OR SOME OF THEM," will support an action by one of them, notwithstanding the disjunctive form in which the words are used, as it may be shown at the trial that the expression "some of them" was used because the writer did not mean that all were guilty, but that the plaintiff alone, or with others, was guilty.

Henry Walker, for the appellant.

Dabney and Fouché, for the respondent.

SIMMONS, J. We think the court below erred in sustaining a demurrer to the declaration on the ground "that the declaration did not present such a statement of facts or causes of action as entitled the petitioner to maintain the suit, and that the facts as stated in the declaration did not make a cause of action sufficient, in law, to authorize any recovery against the defendant." The plaintiff asserts in his declaration, in substance, that the defendant was president of a construction company which had contracted to build a certain railroad; and that the plaintiff and ten others were employed as subordinate engineers by the defendant to survey, lay out, and superintend the work on the railroad and the several residencies thereof, and to estimate and classify the work as it was done from time to time, in order that the construction company might settle with and pay off its subcontractors; that the construction company subsequently sublet the building of the railroad to the Chattahoochee Brick Company, and that the latter company constructed the road; that the plaintiff and the other subordinate engineers, as officers and employees, were placed in charge of the work, and it was their duty to survey, lay out, and superintend the building of the railroad for the construction company, and they were em-

ployed and paid by the construction company for this service; that the plaintiff was placed in charge of the "sixth residency" on the railroad, which extended a distance of eleven miles, and embraced sections 52 to 62, inclusive; that he made monthly estimates of the quantity of earth and material moved and work done by the brick company, as a basis for monthly settlements by the construction company with the brick company; that he and the other engineers mentioned performed their duties skillfully and honestly, and complied fully with their contract in relation thereto; and that thereafter the construction company pretended to dispute the classification and estimate made of the work by the plaintiff and the other officers and engineers, and denied its indebtedness to the brick company for the unpaid balance due that company, and the brick company thereafter began suit against the construction company to recover the same, but that pending an accounting between the parties before an auditor, the construction company admitted its liability, settled it in full, and paid the brick company the balance due it by the construction company; that when the controversy first began, the defendant falsely and maliciously published the following false and defamatory libel of and concerning the plaintiff, and the manner in which he had performed his work, and of his honesty and integrity as a man, and his fitness and capacity as a civil engineer, to wit:—

"Either by erroneous classification, or classification obtained by the brick company and their subcontractors by collusion with the subordinate engineers of the construction company, or some of them, the work of the Chattahoochee Brick Company has been overestimated to the extent of at least one hundred thousand dollars, and probably one hundred and fifty thousand dollars."

The declaration alleges that the defendant caused all the sections of the railroad embraced in residency No. 6, of which the plaintiff had charge, and had surveyed and examined, and the work on which he had estimated for the construction company, to be re-examined and resurveyed, and the work done thereon re-estimated; and that the words above set out and published, and herein complained of, were written and published by the defendant whilst the work of re-examining, resurveying, re-estimating, and reclassifying this residency and the several sections thereof was going on, and before the same was completed, and were understood by the

public at large to apply to the plaintiff, and were so received and considered by them, and were so used, intended, and designed by the defendant. By all of which it was designed and intended by the defendant to charge and accuse the plaintiff with falsely and fraudulently colluding with the brick company and said subcontractors to cheat, defraud, and swindle the construction company; and it was the deliberate intent and purpose of this publication to convey this impression and belief to the public (and it was so received and understood by those who read the publication) that the plaintiff had colluded and combined with the brick company and its subcontractors, and the subordinate engineers of the construction company, to cheat, swindle, and defraud the construction company, and thereby injure the plaintiff's reputation and bring his name and character into disrepute, making his reputation odious, and exposing him to the hatred, contempt, and ridicule of the public at large.

Taking all these allegations together, we think they are sufficient to authorize the plaintiff to submit the question to a jury. It is claimed, however, by the able counsel for the defendant in error that if the publication was libelous, it had reference to a particular class of people, and therefore gave no right of action to an individual of that class. Odgers, in his work on libel and slander, page *127, says: "The defamatory words must refer to some ascertained or ascertainable person, and that person must be the plaintiff. If the words used really contain no reflection on any particular individual, no averment or innuendo can make them defamatory. Though the words used may at first sight appear only to apply to a class of individuals, and not to be specially defamatory of any particular member of that class, still, an action may be maintained by any one individual of that class who can satisfy the jury that the words referred especially to himself. The words must be capable of bearing such special application, or the judge should stop the case. And there must be an averment in the statement of claim that the words were spoken of the plaintiff. The plaintiff may also aver extraneous facts, if any, showing that he was the person expressly referred to." While at first sight the words contended to be libelous in this case may appear to apply only to the subordinate engineers as a class, and not to be specially defamatory of any particular one of them, still, if this plaintiff can satisfy the jury that the words referred especially to him, under this rule he would

be authorized to maintain the action. He avers in the declaration that they were spoken of and concerning him, and he avers extraneous facts to show that they referred to him; he alleges that during the controversy with the brick company, the defendant ordered that section of the railroad which the plaintiff had surveyed and classified to be resurveyed and reclassified, and that whilst this was being done the words complained of were written and published, and that this caused people who read the publication to believe it was intended for him. The author above quoted from also says, page *130: "If the application to a particular individual can be generally perceived, the publication is a libel on him, however general its language may be." In the case of *Wakley* v. *Healey*, 7 Com. B. 591, the words complained of were: "We would exhort the medical officers to avoid the traps set for them by desperate adventurers (innuendo, thereby meaning the plaintiff, among others) who, participating in their efforts, would inevitably cover them with ridicule and disrepute." The jury found that the words were intended to apply to the plaintiff, and he had judgment. In the case of *Le Fanu* v. *Malcomson*, 1 H. L. Cas. 637, the words complained of were contained in a newspaper article which imputed that "in some of the Irish factories" cruelties were practiced upon the work-people (innuendo, "In the factory of the plaintiffs," who were manufacturers). The jury were satisfied that the newspaper was referring especially to the plaintiffs' factory, and found a verdict for the plaintiffs, and the house of lords held the declaration good. Where the words complained of were, "There is strong reason for believing that a considerable sum of money was transferred by power of attorney obtained by undue influence," an innuendo, "Meaning as a fact that the plaintiff had by undue influence procured the money to be transferred," was held not too wide; for such would be the meaning conveyed to readers by the defendant's insinuations: *Turner* v. *Meryweather*, 7 Com. B. 251. See also 13 Am. & Eng. Ency. of Law, 391; Newell on Slander and Libel, 257 et seq.; and note to Townshend on Slander and Libel, 115. Moreover, the words used in this case apply, not to a class, but to a particular group of that class; the difference being as in saying of a class, "All lawyers are thieves," and of a group, all lawyers engaged in a particular case, or some of them, are thieves.

It was claimed by counsel for the defendant in error that the action would not lie because there was no charge of any

specific crime, act of dishonesty, or improper conduct made against the plaintiff, and that the language used was not libelous of the plaintiff; that it was general, indefinite, and disjunctive, and made no positive charge against him. But in actions of this kind it is not necessary that a specific crime should be charged, in order for the plaintiff to maintain his action. The plaintiff claims that it was a charge concerning his business and profession, tending to his injury; and our code says, speaking of oral defamation, that "charges made on another in reference to his trade, office, or profession, calculated to injure him therein," are actionable, and that no special damage is essential to support the action: Code, sec. 2977. If this be true as to mere slander, much more is it true as to written defamation: Code, sec. 2974. We think, if the words were written of and concerning the plaintiff, they did accuse him of an offense amounting at least to moral turpitude; that he colluded with the brick company against his employer, and charged the latter one hundred thousand dollars or one hundred and fifty thousand dollars more than was due.

Nor does it make any difference that the words were put in the disjunctive, to wit, "the subengineers, or some of them." It may turn out on the trial that the expression "or some of them" was used because the writer did not mean that all were guilty, but that the plaintiff, alone or with others, was guilty. The plaintiff would be equally aggrieved if charged alone, or as one of a number of engineers, and equally entitled to maintain his action.

For these reasons, we reverse the judgment of the court below.

LIBEL — WHAT NEWSPAPER PUBLICATIONS ARE LIBELOUS. — The question of newspaper libel is fully discussed in a note to *McAllister* v. *Detroit F. P. Co.*, 15 Am. St. Rep. 333–369.

LIBEL — SPECIAL DAMAGES. — In actions for libel or slander, where the words are actionable *per se*, the plaintiff need not allege special damages: *Moraess* v. *Brooks*, 151 Mass. 567; 21 Am. St. Rep. 474, and note.

HOLLOWAY v. HOLLOWAY.

[86 GEORGIA, 576.]

HOMESTEADS — WIDOW AND STEP-MOTHER AS HEAD OF FAMILY. — When a testator's widow, who is the step-mother of his minor children, undertakes, after his death, to keep together, care for, and support them, she has a right, as the head of a family, to take a homestead in his real estate.

HOMESTEAD, WHEN TERMINATES. — Whether widow's homestead in her deceased husband's estate lasts during her lifetime, as against the children, who have all arrived at age, or whether they are then entitled to a division of the estate as provided in their father's will, *quære*.

HOMESTEAD, WHEN EXPIRES. — As against creditors, a homestead held by a widow in her deceased husband's estate does not expire until her death.

B. F. Tisinger, and Hall and Hammond, for the plaintiff in error.

J. A. Cotten and A. M. Speer, for the defendant in error.

SIMMONS, J. It appears from the record in this case that R. S. Holloway died testate, in 1869, leaving an estate consisting of land and personalty, a widow and nine children, five of whom were minors. The will provided that the property of the testator should be kept together until his youngest child should come of age, when there should be a division in kind, or a sale for division, share and share alike, to his wife and children. The widow was his second wife, and not the mother of the children. In 1874 the widow applied for, as the head of a family, and had set apart, a homestead in a portion of the realty for the benefit of herself and the five minor children. The minor children having all arrived at age, the executor, J. J. Holloway, in 1886, filed his petition in equity, alleging therein the death of the testator, the setting apart of the homestead; charging that the homestead was void, on the ground that Mrs. Holloway, not being the mother of the minor children, was not the head of a family, and therefore had no right to have the homestead set apart for herself and the minor children; and praying for the appointment of a receiver to take charge of the land and the rents thereof, and hold it for the benefit of the estate, etc.

The widow testified that the estate was being wasted, there were debts against it, and she took a homestead to secure a home for herself and the minor children, of whom she had the care and custody, after the death of her husband, until the homestead was set apart; she cared for and raised them, and did the best she could for them; the two minor boys left her before they were of age; she sent one of them to school as

much as he would go, and gave the two younger girls a good education. It appears that none of the children are now living with her upon the homestead estate.

1. In this state of facts, the court charged the jury that if the defendant was the widow of the testator, and had the homestead set apart after his death, and was not the mother of the children named in the petition for homestead, the homestead was void, and she had no right, as the head of such a family, to take a homestead. This charge was excepted to, and made the third ground of the motion for a new trial, which was made by the defendant and overruled by the court. Under the facts of this case, we think the court erred in this charge to the jury. While there was no legal obligation on the part of this widow to support the minor children of her husband, yet we think that inasmuch as she undertook to keep them together, and to care for and support them, as the evidence shows she did, they all remained members of the testator's family, and she thereby became the head of that family, and, under the laws of this state, was entitled to a homestead as the head of a family. See *Capek* v. *Kropik*, 129 Ill. 509, where it was held that on the death of his wife, a widower, together with his minor step-children, was entitled to a homestead in an entire lot of land which he had held in common with his wife. Moreover, when Mrs. Holloway took the minor children under her care and custody, she stood in the relation of a parent to them, and took upon herself that obligation. She then was under a moral obligation to support and maintain these children, and the authorities hold that such a moral obligation is sufficient to entitle her to have a homestead set apart for the benefit of herself and the minor children: *Wade* v. *Jones*, 20 Mo. 75; 61 Am. Dec. 584; *Connaughton* v. *Sands*, 32 Wis. 387; *Greenwood* v. *Maddox*, 27 Ark. 648; *Arnold* v. *Waltz*, 53 Iowa, 706; 36 Am. Rep. 248; *Wilson* v. *Cochran*, 31 Tex. 677; 98 Am. Dec. 553; *McMurray* v. *Shuck*, 6 Bush, 111; 99 Am. Dec. 662; *Brooks* v. *Collins*, 11 Bush, 622; *Bell* v. *Keach*, 80 Ky. 42; *Riley* v. *Smith*, Sup. Ct. Ky., Dec. 3, 1887; *Moyer* v. *Drummond*, 32 S. C. 165; *Chamberlain* v. *Brown*, Sup. Ct. S. C., April, 1890; 7 Am. & Eng. Ency. of Law, 804; Thompson on Homesteads, sec. 45. And see *Marsh* v. *Lazenby*, 41 Ga. 153; *Blackwell* v. *Broughton*, 56 Ga. 390. To the effect that a step-father or step-mother may assume the relation of parent towards the step-children, see 2 Kent's Com. 192; *Sanderlin* v. *Sanderlin*, 1 Swan, 441; *Wil-*

liams v. *Hutchinson*, 3 N. Y. 312; 53 Am. Dec. 301; *Murdock* v. *Murdock*, 7 Cal. 511; *Capek* v. *Kropik*, 129 Ill. 509.

Counsel for plaintiff in error relied upon the case of *Lathrop* v. *Soldiers' L. & B. Ass'n*, 45 Ga. 483, which he claims to hold that "a widow is not the head of a family of minor children of a former husband by a former marriage." It is singular that both of the learned counsel for defendant in error, as well as the editor of the American and English Encyclopædia of Law, vol. 7, p. 804, fell into the same mistake. There was really no widow involved in that case. A glance at the facts of the case will show that Mrs. Lathrop was the wife of J. J. Lathrop, and that both husband and wife joined in the application for homestead out of the wife's estate. She had mortgaged her individual property to the loan association, and made an affidavit on the back of the mortgage that it was executed by her free will and consent, and that the mortgage money was to be used in payment of the price for the property. The money was loaned to her on the faith of this sworn statement, and this court held that she was estopped from controverting the facts stated in her affidavit, and that to allow her to claim a homestead exemption "would be, to speak in the mildest terms, a legal fraud." The court also held that as it was her separate property, and she had no children of her own, she was under no legal or moral obligation to support the children of her husband by a former marriage, nor was she the head of a family of these minor children while he was in life. And this is all that the case rules. If her husband had been dead, and she had taken the control and custody of his children, it would have presented a very different case from the one decided by the court.

2. Counsel in the case argued that as all the children had come of age, the homestead estate had expired, and the children were entitled to a division of the property in accordance with the will of their father. Whether this can be done or not we do not now decide, because the question is not properly made in the record before us. This court has held in several cases, where creditors were seeking to sell the homestead after the minors arrived at age, that it could not be done, because the homestead did not expire till the death of the widow: *Haslam* v. *Campbell*, 60 Ga. 650; *Groover* v. *Brown*, 69 Ga. 60. But so far as we can ascertain, this court has never decided that the homestead lasted during the life of the widow as against the children on their arrival at age, and when they

sued for a division of the property. This question we will leave for future consideration, in case it arises hereafter in this suit or in another action, if the children, or any of them, should institute one.

Judgment reversed.

HOMESTEADS, WHO ENTITLED TO. — As to what is necessary to constitute one the "head of a family," such as will entitle him or her to take a homestead, see *Moyer* v. *Drummond*, 32 S. C. 165; 17 Am. St. Rep. 850, and particularly note; *Lane* v. *Philips*, 69 Tex. 240; 5 Am. St. Rep. 41, and note.

HOMESTEAD, WHEN TERMINATES. — The death of a husband or wife, there being no children, whether puts an end to the family relation and terminates the homestead: Note to *Revalk* v. *Kraemer*, 68 Am. Dec. 309. But compare *Taylor* v. *Boulware*, 17 Tex. 74; 67 Am. Dec. 642, and note; *Kessinger* v. *Wilson*, 53 Ark. 400; *ante*, p. 220, and note.

HUGULEY *v.* LANIER.

[86 GEORGIA, 636.]

HUSBAND AND WIFE — ANTENUPTIAL CONTRACT, WHEN NOT TESTAMENTARY. — An antenuptial contract by which the intended husband binds himself and executors that for and in consideration of the marriage to be solemnized, his executors upon his death shall pay to his prospective wife a certain sum, to be her full and distributive share in his estate, and she binds herself to abide by the terms of the contract, is an absolute and irrevocable contract, equally binding upon both husband and wife, barring her claim for dower, and enforceable by her against her husband's executor.

CONTRACT, WHEN NOT TESTAMENTARY IN CHARACTER. — A contract does not take on a testamentary character because its performance is postponed until after the death of the maker and devolves upon his representatives.

CONTRACT TO MAKE A WILL MAY BE ENFORCED, and if not performed, a recovery may be had for its violation.

F. M. Longley and N. J. Hammond, for the appellant.

T. H. Whitaker, P. H. Brewster, and R. A. S. Freeman, for the respondent.

BLECKLEY, C. J. The superior court classified the stipulations of the instrument declared upon as testamentary in their nature. This was a total misconception. The instrument is not a conveyance, but a covenant to pay money. There was no attempt to establish between the parties the relation of donor and donee, or of testator and legatee, but the relation established by the covenant was that of debtor and creditor. In

contemplation of marriage, the prospective husband, on behalf of himself, his heirs, executors, and administrators, covenanted under his hand and seal, for and in consideration of the marriage to be had and solemnized, that his executors upon his death should pay over to his prospective wife the sum of four thousand dollars, this sum to be her full and complete distributive share in his estate. On her part she covenanted, under her hand and seal, that she would abide by the terms of the instrument, and consequently that she would not participate further in his estate, unless he should see proper to give her any money or property before his death. These are the substantial provisions of the instrument as an antenuptial contract, and the suit is brought to recover the four thousand dollars, the plaintiff alleging in her declaration that the marriage took place as contemplated, that her husband is dead, and that the defendant is his qualified executor, having assets with which to make payment. The contract was absolute and irrevocable. The husband had no more power to abrogate or revoke it than the wife had. It bound them both equally. It was a bar to any claim of dower which she otherwise would have had: Code, sec. 1764; *Culberson* v. *Culberson*, 37 Ga. 296; *Hamilton* v. *Jackson*, 2 Jones & L. 295; *Andrews* v. *Andrews*, 8 Conn. 79; *Naill* v. *Maurer*, 25 Md. 532. Authority coincides with principle in rendering such an undertaking obligatory upon the husband's estate and legal representatives: *Smith* v. *Stafford*, Hob. 216; *Clark* v. *Thomson*, Cro. Jac. 571; *Goodwin* v. *Goodwin*, Cro. Jac. 570; *Cage* v. *Acton*, 1 Ld. Raym. 515; *Acton* v. *Pierce*, 2 Vern. 480; *Milbourn* v. *Ewart*, 5 Term Rep. 381; *Rivers* v. *Rivers*, 3 Desaus. Eq. 190; 4 Am. Dec. 609. And see *Carter* v. *King*, 11 Rich. 125; *Godbold* v. *Vance*, 14 S. C. 458.

A contract does not take on a testamentary character because its performance is postponed till after the death of the maker and devolves upon his representatives. Even a parol promise to be performed after death may be obligatory: *Powell* v. *Graham*, 7 Taunt. 580; *Riley* v. *Riley*, 25 Conn. 154. A promissory note may be made payable after the maker's death: *Roffey* v. *Greenwood*, 10 Ad. & E. 222; *Bristol* v. *Warner*, 19 Conn. 9; or after the death of a third person; *Cooke* v. *Colehan*, 2 Strange, 1217; Willes, 393; *Washband* v. *Washband*, 24 Conn. 500.

Were the covenant in question considered as a contract to make a will, it would be none the less obligatory; for such

contracts are enforceable, and if not performed, a recovery may be had for their violation: *Napier* v. *Trimmier*, 56 Ga. 300; *Johnson* v. *Hubbell*, 10 N. J. Eq. 332; 66 Am. Dec. 773, and notes; *Manning* v. *Pippen*, 86 Ala. 357; 11 Am. St. Rep. 46, and note.

Of course, treating the covenant as having this latter import would involve some change in the pleading as well as in the evidence. We think the pleader in this case adopted the right construction, and that the action was well brought upon the instrument as an absolute undertaking, not to make a will leaving the plaintiff four thousand dollars, but to pay that sum out of his estate as a debt chargeable upon the same. The court erred in excluding the instrument when offered in evidence to support the action.

Judgment reversed.

CONTRACTS TO MAKE A WILL. — One may execute a valid and enforceable agreement to make a disposition of his property by will: *Carmichael* v. *Carmichael*, 72 Mich. 76; 16 Am. St. Rep. 528, and note; *Rice* v. *Hartman*, 84 Va. 251; *Bird* v. *Pope*, 73 Mich. 483. A parol agreement to execute a will is within the statute of frauds, and not capable of being specifically performed: *Schoonover* v. *Vachon*, 121 Ind. 3; *Ellis* v. *Cary*, 74 Wis. 176; 17 Am. St. Rep. 125, and note.

WRITING, WHEN A WILL AND WHEN NOT: See *Sharp* v. *Hall*, 86 Ala. 110; 11 Am. St. Rep. 28, and note 32, 33. The intention of the maker of an instrument determines whether it is a will or not. Where an instrument conveys a present title to the grantee, it is a deed, even though the grantor reserves out of the estate conveyed the right to the use of the premises during his life: *Beebe* v. *McKenzie*, 19 Or. 296; *Bunch* v. *Nicks*, 50 Ark. 367. An instrument may operate partly as a deed and partly as a will: *Kyle* v. *Perdue*, 87 Ala. 424; *Reed* v. *Hazleton*, 37 Kan. 321. An instrument executed with the formalities required by statute, to operate only after the death of the maker, is a will: *Lautenshalager* v. *Lautenshalager*, 80 Mich. 286. A testamentary instrument does not cease to operate as a will because it is acknowledged and recorded as a deed: *Hawes* v. *Nicholas*, 72 Tex. 481.

GEORGIA RAILROAD AND BANKING CO. v. ESKEW.

[86 GEORGIA, 641.]

COMMON CARRIERS — RIGHTS OF PASSENGER. — A passenger who has paid for and supplied himself with a ticket in all respects valid and regular, boarded the proper train, conducted himself in a proper manner, and surrendered his ticket to the company at its request, cannot be required either to produce the ticket when again called upon for it, or to pay fare as a condition of remaining upon the train and being carried to his terminus as indicated upon his ticket; nor does he lose any of his rights by any mistake made by the conductor in reading the ticket, construing it, mingling it with other tickets, or otherwise disposing of it.

COMMON CARRIERS — EXPULSION OF PASSENGER. — While a passenger cannot avail himself of a formal order of the conductor to quit the train, not meant to be absolute and final, as a pretext for leaving the train and grounding an action against the company for expulsion, yet, where the circumstances fairly warrant him in believing that the conductor means what he says, and he really believes it, he need not wait for the employment of actual force against him, but may submit to the moral coercion of the conductor's authority, and abandon the train as an expelled passenger.

COMMON CARRIERS — EXPULSION OF PASSENGER. — A passenger, whether right or wrong in any contention or misunderstanding with a conductor, is under no duty, either legal or moral, to remain on the train until the conductor appeals to force for the execution of his commands in expelling him. If the passenger obeys the command to leave the train, and thereby does an act to which his own will does not consent, he is coerced.

COMMON CARRIERS — EXPULSION OF PASSENGER — EVIDENCE OF INTENT. — In an action by a passenger to recover for expulsion from a train, evidence as to whether or not it was the intent of the conductor to expel him is admissible, as affecting the question of punitive damages, and the conductor may testify as to his intent.

COMMON CARRIERS — EXPULSION OF PASSENGER — EVIDENCE OF INTENT. — In an action by a passenger to recover for expulsion from a train, evidence that the conductor remained silent after the passenger remarked in his hearing, upon alighting from the train, "that it was hard to be put off and be compelled to pay one's fare," is admissible, and should be considered by the jury in arriving at a determination as to whether or not it was the intent of the conductor to eject the passenger.

COMMON CARRIERS — EXPULSION OF PASSENGER — EXCESSIVE DAMAGES. — In an action by a passenger to recover for expulsion from a train, a verdict for $750 would seem to be excessive, in the absence of proof of any willful or intentional violation of the passenger's rights on the part of the conductor, although the latter was negligent and in error.

COMMON CARRIERS — EXPULSION OF PASSENGER — MEASURE OF DAMAGES. — A person upon whom a wrong has been committed is bound to lighten the damages as much as he can by the use of ordinary care and diligence, and as to the extent in which his damages are increased by his failure to observe such care and diligence, they are the result of his own negligence. This rule applies to a passenger expelled from a train, in considering the time and mode of traveling from the place of his expulsion to the station to which he is entitled to ride.

COMMON CARRIER — EXPULSION OF PASSENGER — MEASURE OF DAMAGES. — Whether or not a common carrier shall pay more or less damages for expelling a passenger and failing to carry him to a certain station does not depend on what occurs to the passenger after he passes such station. The carrier need only make him whole for what he has lost by delay and otherwise up to the time of his reaching such station.

COMMON CARRIERS — EXPULSION OF PASSENGER — MEASURE OF DAMAGES. — In an action by a passenger to recover for expulsion from a train, compensation for his inconvenience, physical hardship, and injury to health from the time he was expelled until he arrived at the station to which he was entitled to ride, or incurred thereafter, should be denied altogether, if they were needlessly incurred.

COMMON CARRIERS — EXPULSION OF PASSENGER. — COMPENSATION FOR WOUNDED FEELINGS, in an action by a passenger to recover for expulsion from a train, must be determined by the jury, under the circumstances of each particular case.

COMMON CARRIER — EXPULSION OF PASSENGER. — PUNITIVE DAMAGES may be awarded for the unlawful expulsion of a passenger from a train, but they should be graduated with reference to the special circumstances of each case.

J. B. Cumming and A. C. McCalla, for the plaintiff in error.

H. T. Lewis and G. W. Gleaton, for the defendant in error.

BLECKLEY, C. J. The learned counsel for the railroad company argued only four of the grounds of the motion for a new trial. To these our opinion will be confined.

1. That the evidence, construing it, as we are bound to do, most favorably for the prevailing party, warranted a verdict for some amount against the company, we have no doubt. The tickets surrendered to the conductor by the plaintiff and his brother were from Atlanta to Social Circle; and that the conductor could and would have known this, had he exercised due care in the transaction of his business, admits of no question. If by reason of his own negligent mistake he expelled the plaintiff at Conyers, an intermediate station, when the plaintiff was rightfully on the train and entitled to be carried to his destination at Social Circle, the expulsion was wrongful, and a breach of the legal duty of the company as a common carrier. A passenger who has paid for and supplied himself with a ticket in all respects valid and regular, boarded the proper train, conducted himself thereon in a proper manner, and surrendered the ticket to the company at its own request, cannot be required either to produce the ticket when again called upon for it, or to pay fare as a condition of remaining upon the train and being carried to the point indicated upon the ticket as the terminus of his route.

He has no further concern with the ticket, and can lose none of his rights by any mistake made by the conductor in reading it, construing it, mingling it with other tickets, or disposing of it otherwise.

(a.) Although the conductor neither used physical force to expel the plaintiff from the train nor was immediately present when the plaintiff left the train at Conyers, yet it was in fact an expulsion if the plaintiff alighted against his own will, and as an act of obedience to the conductor's previous command. Nor does it matter whether the command was given shortly before the train arrived at Conyers or after its arrival, provided it was or seemed to be peremptory, and the plaintiff so understood and treated it. There was evidence from which the jury could infer that the command appeared peremptory, and that the plaintiff yielded to it in good faith. Whilst a passenger cannot avail himself of a formal order of the conductor, not meant to be absolute and final, as a pretext for leaving the train and grounding an action against the company for expulsion, yet, where the circumstances fairly warrant him in believing that the conductor means what he says, and he really does believe it, he need not wait for the employment of actual force against him, but may submit to the moral coercion of the conductor's authority, and may abandon the train as an expelled passenger. If conductors do not mean that passengers shall withdraw themselves from trains, they should not issue their commands prematurely. All passenger conductors are by statute invested with the powers of police-officers while on duty upon their trains: Code, sec. 4586 a. A passenger, whether right or wrong in any contention or misunderstanding with a conductor, is under no duty, legal or moral, to stand out until the conductor appeals to force for the execution of his commands. If the passenger obeys, and thereby does an act to which his own will does not consent, he is coerced: *Georgia Railroad* v. *Homer*, 73 Ga. 251. So far from being under a duty to resist, he would, generally, put himself in the wrong by offering resistance. For the sake of peace and good order, he ought to submit.

2. Section 3066 of the code reads thus: "In every tort there may be aggravating circumstances, either in the act or the intention; and in that event, the jury may give additional damages, either to deter the wrong-doer from repeating the trespass, or as compensation for the wounded feelings of the

plaintiff." This section was applicable to the case as made by the evidence of the plaintiff below, and was properly given in charge to the jury: *Georgia Railroad* v. *Homer*, 73 Ga. 252; *Georgia Railroad* v. *Olds*, 77 Ga. 674. For this reason, the intention of the conductor was for investigation and determination by the jury as an element affecting punitive damages: *Georgia Railroad* v. *Homer*, 73 Ga. 251. If the purpose of the conductor was misunderstood, and he really had no intention of expelling the plaintiff from the train, although he had used language calculated to produce that impression, there was no aggravating circumstances taking its character from intention, and therefore no aggravating circumstance at all, unless found in the act itself, considered apart from intention and viewed in the light of the time, place, and manner of its commission. From the general tenor of the conductor's evidence, it is highly probable he would have testified, had he been allowed to do so, that he had no intention to expel the plaintiff at Conyers. We think the court erred in refusing to allow counsel for the company to ask the conductor "whether or not it was his purpose to eject plaintiff from the train." As bearing upon the question of punitive damages, this was a legitimate inquiry; and there can be no doubt that the conductor was a competent witness to prove what his intention really was. There were divers circumstances in evidence tending to show that he intended expulsion. His answer on oath that he did not would have been direct evidence to the contrary of what the circumstances, as indirect evidence, tended to establish. In deciding upon the question of intention, the jury should have had before them both the direct evidence excluded and the indirect which was admitted. The company could not escape being affected by the conductor's intention, and this being so, it should have been allowed to show what that intention was. If the plaintiff had afterwards waived any claim for punitive damages, this error of the court would have been immaterial; but as there was no such waiver, and as the amount of damages awarded by the jury was very large for such a case, we think the company is entitled to a new trial on this ground.

3. There was no error in charging the jury, as set out in the thirteenth ground of the motion for a new trial, that in determining whether the conductor intended to eject the plaintiff, the jury could take into consideration the remark made by the plaintiff after he alighted from the train, but in the pres-

ence and hearing of the conductor, "that it was hard to be put off, and be compelled to pay one's fare," and the failure of the conductor to make any reply to it. The conductor admitted in his evidence that he heard the observation and made no reply. He does not explain why he made none. If he had been misunderstood, he could easily have said so to the plaintiff in answer to the remark above quoted, and the jury might think it a legitimate inference from his silence that he was not misunderstood. True, the whole scene bears a different construction, but what it really meant was for the jury; and the court merely submitted it for their consideration. This was correct. But that it was correct makes it more clear that the court erred, as we have ruled under the preceding head, in not allowing the conductor to testify with reference to his intention; for if his silence at the time of the transaction would throw light upon it, why would not his direct statement under oath at the trial be receivable to show what it really was? The charge, it will be noticed, relates to actual intention, the kind of intention which might aggravate the tort, and serve as a basis for punitive damages. To allow compensatory damages, it would not be necessary for the jury to find actual intention; it would be enough for them to find apparent intention; that is, such manifestation of intention by the conductor as would justify the plaintiff in believing that he had made up his mind to expel the plaintiff, although he had no such purpose, and was in fact misunderstood.

4. As a new trial is to be had, it is not absolutely necessary for us to decide whether the damages, assessed at $750, were excessive or not. We are strongly inclined to the opinion that the amount is out of reasonable and conscientious proportion with the magnitude of the injury. Numerous instances tending to illustrate the question of excessive damages by actual cases are collated in 5 Am. & Eng. Ency. of Law, 55 et seq., but at last each case must be ruled chiefly on its own facts and special circumstances. In the present case, there is no indication in the evidence, taking it altogether, that there was any willful or intentional violation of the plaintiff's rights on the part of the conductor. No doubt he was in error, and that he fell into error on account of his own negligence. It was his duty to know that the tickets which he took up from the plaintiff and his brother were for Social Circle, and his failure to know it, and have the means of verification afterwards, is without any reasonable excuse that we can discover in the record. Between

the conductor and these two passengers there were probably three misunderstandings. He thought either that they got on the train at Stone Mountain, or with tickets for that point and no farther; they knew that they got on at Atlanta with tickets for Social Circle. He thought they claimed to have had and surrendered tickets for Greenesboro; they were sure they did not tell him they had tickets for that station. He thought he had not ordered them, in a final and peremptory way, to leave the train at Conyers; they construed his language as requiring them to do so. Without imputing perjury to any witness, the fact that two, if not all three, of these misunderstandings existed can be arrived at with a fair degree of certainty. Throwing all the blame on the conductor, and allowing the jury the fullest scope in the exercise of their discretion which the law recognizes, what are the elements of damage? They are,—1. Compensation for pecuniary loss, for necessary inconvenience and physical hardship, and for proximate injury to health; 2. Compensation for wounded feelings; 3. Punitive damages.

5. The direct pecuniary loss was the cost of going to Social Circle from Conyers by the first available and appropriate conveyance, together with the expense and loss of time incident to waiting for and procuring such conveyance. A person upon whom a wrong has been committed is under obligation to lighten the damages as much as he can by the use of ordinary care and diligence. To the extent in which his damages are increased by his failure to observe such care and diligence, they are the result of his own negligence: Field on Damages, secs. 126 et seq.; 1 Sedgwick on Measure of Damages, 164 et seq.; Weeks on Damnun Absque Injuria, sec. 121; 1 Sutherland on Damages, 148. In such a case as this, where the only fault or mistake involved in the cause of expulsion was on the part of the conductor, it was not the duty of the passenger to pay fare to prevent expulsion. He was under no obligation, legal or moral, to purchase exemption from a threatened or impending tort, but could stand upon his legal rights, or waive them, according to his election.' He could not be made a trespasser where he had a legal right to be and remain, unless he waived that right, and he could not be forced by the conductor, or any other human power, to waive it. He had purchased it with his money, it was a vested right, and not even the legislative power of the state could deprive him of it, or force him to yield it against his

will. And to expel him from the train when he was not a trespasser, nor otherwise at fault, was to commit upon him a tortious injury. To eject as a trespasser one who is not an intruder is not to make him a trespasser, but to become one yourself: Bishop on Non-contract Law, 1096.

But as soon as the act of expulsion was complete, the plaintiff became subject to the rule of diligence to which we have just referred. The expulsion was not at night, but in the afternoon. It affirmatively appears that he had money enough to procure transportation by the same train from Conyers to Social Circle, the distance being twenty-one miles. Perhaps he might be excused for not taking passage on that train; but after spending the night at Covington, he still had money enough, and more than enough, to pay his way and that of his brother to the point to which the company ought to have carried them in the first instance, it being only eleven miles. It thus appears that the plaintiff was not obliged to walk in order to reach Social Circle, and if he did so at a greater cost of money and time than he need to have expended in waiting for a train and going by railway, he was not without fault. His recovery on this item should be limited to what it would have cost him in money and time to reach Social Circle from Conyers by the cheapest appropriate means which he could have used in the exercise of ordinary diligence, unless he suffered further direct damage from detention or delay. For his time and expenses in continuing his journey beyond Social Circle, no recovery can be had, for the reason that they are too remote. After reaching the destination to which the company was bound to convey him, his cause of action against the company, both as to time and money, was complete, and his recovery now should be the same as if the action had been commenced at that moment. If his damages were still accruing as he traveled on down the railroad upon foot one mile beyond Social Circle, and continued to accrue through the day's journey until he arrived at Madison, and still continued after he left the railroad at Madison and went through the country to where he lodged for the night, and then ran on till he reached his mother's house next day, we see not what would have stopped them had his final destination been New York or Boston, and he had gone there on foot before ceasing to run up the damages. Whether a common-carrier shall pay more or less damages for failing to carry a passenger to a way-station on its line cannot depend, as a general rule, on what

occurs to the passenger after he passes that station. If the company makes him whole for what he has lost by delay and otherwise up to the time of reaching there, this is enough. Subsequent losses are amongst the contingencies of life, which each man must bear for himself.

6. As to inconvenience and physical hardship, compensation for these should be denied altogether if they were needlessly incurred; and they were needlessly incurred, in part at least, if the plaintiff and his brother could have reached Social Circle by waiting at Conyers or Covington for the next train, or if, with the means at their command, they could have procured conveyance and spared themselves the fatigue and exposure of proceeding on foot to Social Circle: *Morse* v. *Duncan*, 14 Fed. Rep. 396; 8 Am. & Eng. R. R. Cas. 374; *Chicago, R. I., & P. R'y Co.* v. *Brisbane*, 24 Ill. App. 467. By walking voluntarily they could not entitle themselves to recover of the company more than it would have cost them to ride. And the same may be said as to the alleged injury to the plaintiff's health. If his health would not have suffered had he not walked, and if he was not obliged to walk in order to reach Social Circle, but chose to do so rather than spend his money, he can recover nothing for injury to his health: *Indianapolis etc. R'y Co.* v. *Birney*, 71 Ill. 391; *Francis* v. *St. Louis T. Co.*, 5 Mo. App. 7; *Chicago, R. I., & P. R'y Co.* v. *Brisbane*, 24 Ill. App. 467; *Railroad Co.* v. *Fleming*, 14 Lea, 154. The line of distinction between these cases and such as *International G. N. R'y Co.* v. *Terry*, 62 Tex. 380, 50 Am. Rep. 529, and *Spicer* v. *Lynn etc. R'y Co.*, 149 Mass. 207, is very broad. With inconvenience, hardship, or hurt to his health, originating after the plaintiff left Social Circle, no matter what method of travel he adopted, the company would have no concern. Such remote incidents of his expulsion from the train at Conyers, in violation of a duty to convey him to Social Circle, but no farther, would be too contingent to enter into the computation of his damages: Code, secs. 3071–3073.

7. Compensation for wounded feelings, and to redress any indignity offered the plaintiff whilst upon the train as a passenger, is for estimation by the jury; but not only the literal facts in evidence, but their actual effect on the emotions, should be regarded. What degree of mortification or humiliation was consciously experienced by the plaintiff? Was he cast down and made ashamed? What is the explanation of his not being silent on the subject after leaving the train,

instead of calling attention to his grievance by a random remark in the hearing of the conductor and others who might chance to be within the sound of his voice? These are questions to be considered.

8. Punitive damages may be awarded in such a case if the jury think proper to allow them, but should be graduated with reference to the special circumstances. Amongst these circumstances is the singular fact that, before leaving the train, the plaintiff did not protest or remonstrate with the conductor against being denied his rights as a passenger. He made no distinct objection to leaving the train. Indeed, he must have seemed to the conductor to leave it hurriedly and almost willingly; and the remark that it was hard to be put off and be compelled to pay one's fare could well have been understood as a speech to cover retreat with a thin drapery of plaintive words after an unsuccessful attempt to beat the railroad out of a ride on imaginary tickets. This construction would have been unjust, but might have been adopted by the conductor without any intention to do injustice. We have studied the evidence carefully, and it suggests as a probable theory that, after the misunderstanding arose between the passenger and the conductor, the passenger was not as helpful as he might have been in freeing the conductor from his mistake, and that he was less intent upon reaching Social Circle by that train than upon having a good case against the company. If this is a true theory, it ought to bar punitive damages altogether. It may or may not be true.

A new trial, however, is ordered, upon the one ground only, — that of the excluded evidence.

Judgment reversed.

COMMON CARRIER — EXPULSION OF A PASSENGER. — If a conductor of a railroad train ejects therefrom the holder of a valid ticket, the company will be liable for damages; and in assessing such damages, the annoyance, vexation, and indignity suffered in connection with such expulsion should be considered: *Carsten* v. *Northern etc. R. R. Co.*, 44 Minn. 454; 20 Am. St. Rep. 589, and note; *Cain* v. *Minneapolis etc. R'y Co.*, 39 Minn. 297; *Shepard* v. *Chicago etc. R'y Co.*, 77 Iowa, 54.

GEORGIA RAILROAD AND BANKING COMPANY v. DOUGHERTY.

[86 GEORGIA, 744.]

COMMON CARRIERS — EXPULSION OF PASSENGER — SALE OF WRONG TICKET — DAMAGES. — Where a railroad ticket-agent sells the wrong ticket to a person who has asked for and believes that he has received the right ticket, and who, having no money to pay an additional fare, is afterwards ejected from the train by the conductor, under protest, after explaining to him the circumstances of the case and of the purchase of the ticket, he is entitled to recover vindictive as well as compensatory damages of the railroad company. The amount of such recovery must be governed by the circumstances of each particular case.

COMMON CARRIERS — DUTY AS TO PURCHASE OF TICKET. — A person purchasing a railway ticket has a right to rely upon the agent of the company to give him a proper ticket, when called and paid for; and no peculiar circumstances intervening, there is no duty upon the purchaser to examine the ticket, and any mistake which may occur is chargeable to the railroad company, and not to the purchaser or receiver of the ticket. The company may be compelled to respond in damages for its mistake.

J. B. Cumming and Bryan Cumming, for the plaintiff in error.

M. P. Foster, for the defendant in error.

BLANDFORD, J. The defendant in error brought her action against the plaintiff in error, in which she alleged that she bought from the agent of the railroad company a ticket to go from Aiken, South Carolina, to Atlanta, Georgia, over the road of said company; that she purchased this ticket at night, paid her money for the fare, received the ticket from the agent, and when she was between Augusta and Atlanta, being called on by the conductor for a ticket, she presented the ticket she had purchased, when it appeared that the same was to Asheville, North Carolina, instead of to Atlanta. The conductor objected to the ticket, and said she could not ride upon the same. Thereupon she stated to the conductor that her trunk had been checked to Atlanta upon that ticket, which fact he denied, but upon subsequent investigation found to be true. Plaintiff having no money with which to pay her fare, the conductor ejected her from the train, putting her off at a small station on the road. She brought her suit against the company for thus being ejected from the train. The jury found a verdict in her favor, and the railroad company moved for a new trial, which the court overruled, and it excepted, alleging as error the several grounds taken in the motion. This is the case which is presented to us for decision.

The first four grounds of the motion for a new trial are the usual ones, that the verdict is contrary to law and the evidence, against the weight of the evidence and without evidence to support it, contrary to the principles of equity and justice, and excessive. We do not think the verdict is contrary to law or the evidence, or strongly and decidedly against the weight of the evidence, as will be seen hereafter. Neither do we think the verdict is excessive.

The first special assignment of error is because the court charged the jury as follows: "When a railroad company undertakes to sell tickets and has an agency for that purpose, and they sell a wrong ticket and injury ensues, the company is liable. The law does not require a person dealing with a ticket-agent to examine his ticket and see what it purports to be, but places upon the railroad company, through its agent, the responsibility of giving the ticket applied for. If you are satisfied from the evidence submitted that she applied for a ticket from Aiken, South Carolina, to Atlanta, Georgia, that she paid her fare, or the charges for such a ticket, then she had the right to presume that she had been given a ticket which would give her the passage sought." This charge of the court is assigned as error as being contrary to law. See the case of *Georgia R. R.* v. *Olds*, 77 Ga. 673, in which we think this point is substantially ruled in favor of the charge of the court. See also case of *Hufford* v. *Grand Rapids etc. R. R. Co.*, 64 Mich. 631, 8 Am. St. Rep. 859, in which it was held that "where a passenger who has purchased a ticket of the authorized agent of a railroad company, believing in good faith that it is genuine and issued by the company, and such as the agent had a right to sell, states such facts to the conductor of the train, such conductor is bound to take such facts as true until the contrary is proven, without regard to any words, figures, or other marks on the ticket; and where, upon such passenger's refusing to pay fare, the conductor lays hands upon him with the purpose of removing him from the train, the conductor is guilty of assault and battery, for which the company is liable in damages." In the present case it appears that the passenger stated to the conductor the circumstances under which she purchased the ticket, and furthermore stated that her trunk had been checked to Atlanta, her destination, upon such ticket (which the conductor subsequently ascertained was the fact), and that she had no money with which to pay her fare to Atlanta, notwithstanding all of

which the conductor ejected her from the train. We think, under these circumstances, she had a right to recover damages from the railroad company. The conductor put her off at a way-station at night, in which place there were no accommodations, and she had to walk some two and a half miles in order to secure a place to stay at. We think she had a right to rely upon the ticket she had purchased from the agent of the railroad company as being a proper one, without an examination of the same; and nothing else appearing, there being no intervening circumstances which required her to look at the ticket, if she could have read the same such conduct upon the part of the railway company and its agents authorized her to recover damages. Nor are we prepared to say that the damages recovered in this case are excessive. The plaintiff was a colored woman, old and infirm, and in bad health, and was returning to Atlanta on account of her husband's death. We think, therefore, that the case we have referred to fully sustains this view.

It is further alleged as error that the court charged the jury as follows: "If she asked for the ticket and there was no mistake on her part in calling for it, and the wrong ticket was given her, then it was the fault of the railroad company." It is alleged that this charge is contrary to law. We think not.

Exception is also taken to the following charge of the court: "In every tort there may be aggravating circumstances, either in the act or the intention, and in that event the jury may give additional damages, either to deter the wrong-doer from repeating the trespass, or as compensation for the wounded feelings of the plaintiff. In some torts the entire injury is to the peace, happiness, or feelings of the plaintiff; in such cases no measure of damages can be prescribed, except the enlightened consciences of impartial jurors. The worldly circumstances of the parties, the amount of bad faith in the transaction, and all the attendant facts should be weighed. If, reviewing the testimony, you feel that the circumstances proven are such as to require damages to deter the wrong being repeated, you should consider all these circumstances." Counsel for the plaintiff in error contend that although the principle of law as given in charge is correct, there were no facts developed by the evidence in the case that authorized or called for such a charge. The charge in this case is consonant and in conformity with the code of this state (sec. 3066), and we think the evidence developed sufficient facts to authorize the

same. It was shown by the plaintiff in the court below that she had no money with which to pay her fare; and it was shown that the defendant, who is the plaintiff in error here, was a corporation and was operating a railroad. Thus we think the worldly circumstances of the parties were in some measure before the jury to be considered by them, if the charge was otherwise correct.

It is further alleged that the court erred in refusing to give the following written requests to charge, made by counsel for the plaintiff in error: "No person shall recover from a railroad company for injury to himself or his property where the same is done by his consent, or is caused by his own negligence." "If the plaintiff, by ordinary care, could have avoided the consequences to herself caused by the defendant's negligence, she is not entitled to recover." "If the plaintiff was on the train of the Georgia railroad without a ticket which entitled her to be there, but on the contrary, with a ticket which plainly, on its face, showed that she did not have that right, and she, as well as the agent who sold the ticket, was chargeable with the mistake by which she had the wrong ticket, she should have paid her fare and called upon the railroad company to rectify the mutual mistake. And when, under the circumstances, she was required to leave the train, she had no cause of action against the company for such expulsion." If what we have already said be correct, and we think it is, the court was right in refusing to give these requests to charge.

Again, it is insisted that the court erred in refusing to give the following written request to charge: "If the jury believe that the ticket-agent who sold the wrong ticket to plaintiff intended in fact to sell her the right ticket; that his failure to do so and his selling her the wrong ticket resulted from a negligent mistake only, unmixed with bad faith or malice; and if the mistake was apparent on the face of the ticket, and the plaintiff could have discovered it by merely looking at her ticket, then she was as much chargeable with the mistake as the agent was. It was her mistake as well as his, and she cannot recover damages on account of anything which flowed naturally from her own mistake." We think the court was right in refusing to give this charge to the jury. If the law is as we think it is, a party purchasing a railway ticket has a right to rely upon the agent of the company to give him a proper ticket when called and paid for; and no peculiar circumstances intervening, there is no duty upon the person purchas-

ing to examine the same; and any mistake which may occur is chargeable to the railway company, and not to the person receiving or purchasing the ticket. We therefore think there was no error in refusing to charge as requested.

Judgment affirmed.

COMMON CARRIER — EXPULSION OF PASSENGER — SALE OF IMPROPER TICKET — DAMAGES. — A railway company cannot urge the error of an agent in selling a ticket as an excuse for disregarding it, and as a relief from damages for ejecting a passenger from its train: *Head* v. *Georgia etc. R'y Co.*, 79 Ga. 358; 11 Am. St. Rep. 434; *Pennsylvania Co.* v. *Bray*, 125 Ind. 229. Compare *Georgia R. R. etc. Co.* v. *Eakes*, 86 Ga. 641, *ante*, p. 490.

CASES

IN THE

SUPREME COURT

OF

ILLINOIS.

BAIRD *v.* SHIPMAN.

[132 ILLINOIS, 16.]

AGENT'S PERSONAL LIABILITY TO THIRD PERSONS FOR NEGLIGENCE. — An agent of the owner of property who has the complete control and management of the premises, and who is bound to keep them in repair, is liable to a third person for injuries resulting to the latter while using the premises in an ordinary and appropriate manner, through the neglect of such agent to keep the premises in proper repair. And the agent cannot excuse himself on the plea that his principal is liable. It is not his contract with his principal that exposes him to liability to third persons, but his common-law obligation to so use that which he controls as not to injure another.

DUTY OF AGENT TO USE REASONABLE CARE IN EXECUTING WORK UNDERTAKEN BY HIM. — Where an agent once actually undertakes and enters upon the execution of a particular work, it is his duty to use reasonable care in the manner of executing it, so as not to cause to third persons any injury which may be the natural consequence of his acts, and he cannot by abandoning its execution midway, and leaving things in a dangerous condition, exempt himself from liability to any person who suffers injury by reason of his having so left them without proper safeguards.

ACTION to recover damages. The facts are stated in the following opinion of the appellate court, which was delivered by Garnett, P. J.: —

GARNETT, P. J. "This is an appeal from a judgment for damages founded on the alleged negligence of appellants, by which the death of Joseph Garnett, appellee's intestate, is said to have been caused. The place where the injury happened was in a barn situated on premises on Michigan Avenue, in Chicago, belonging to Aaron C. Goodman, who was then, and for several years before, a resident of Hartford, Connecticut.

Appellants were his agents for renting the premises during the years 1884 and 1885, and during both years were carrying on the real estate business in Chicago. On the trial, evidence was given tending to show that they had in fact complete control of the premises, with the residence and barn thereon, repairing the same in their discretion, and there was no proof that in such matters they received any directions from the owner. The property was rented by appellants to Emma R. Wheeler and A. R. Tillman from April 1, 1884, to April 30, 1885, and to Emma R. Wheeler from May 1, 1885, to April 30, 1886. Both leases were in writing, and by the terms of each lease the tenants covenanted to keep the premises in good repair. The tenant in the last lease rented the premises to Nellie E. Pierce, who occupied the same from April 28 to September, 1885. The evidence tends to prove that when the lease was made to Emma R. Wheeler, the large carriage-door to the barn was in a very insecure condition, and that appellants, through one Warner, the manager of their renting department, verbally agreed with Mrs. Wheeler to put the premises in thorough repair. Nothing was done to improve the condition of the door, and on June 12, 1885, while the deceased, an expressman by occupation, was engaged in delivering a load of kindling in the barn for one of the parties living in the house, the door, weighing about four hundred pounds, fell from its fastenings, and injured him to such an extent that he died the next day.

"Appellants make two points: 1. That the verdict is clearly against the weight of the evidence; 2. That they were the agents of the owner, Goodman, and liable to him only for any negligence attributable to them.

"There is nothing more than the ordinary conflict of evidence found in such cases, presenting a question of fact for the jury, and the finding must be respected by this court in deference to the well-settled rule.

"The other point is not so easily disposed of. An agent is liable to his principal only for mere breach of his contract with his principal. He must have due regard to the rights and safety of third persons. He cannot, in all cases, find shelter behind his principal. If, in the course of his agency, he is intrusted with the operation of a dangerous machine, to guard himself from personal liability he must use proper care in its management and supervision, so that others in the use of ordinary care will not suffer in life, limb, or property:

Suydam v. *Moore*, 8 Barb. 358; *Phelps* v. *Wait*, 30 N. Y. 78. It is not his contract with the principal which exposes him to or protects him from liability to third persons, but his common-law obligation to so use that which he controls as not to injure another. That obligation is neither increased nor diminished by his entrance upon the duties of agency, nor can its breach be excused by the plea that his principal is chargeable: *Delaney* v. *Rochereau*, 34 La. Ann. 1123; 44 Am. Rep. 456.

"If the agent once actually undertakes and enters upon the execution of a particular work, it is his duty to use reasonable care in the manner of executing it, so as not to cause any injury to third persons which may be the natural consequence of his acts; and he cannot by abandoning its execution midway, and leaving things in a dangerous condition, exempt himself from liability to any person who suffers injury by reason of his having so left them without proper safeguards: *Osborne* v. *Morgan*, 130 Mass. 102; 39 Am. Rep. 437.

"A number of authorities charge the agent, in such cases, on the ground of misfeasance, as distinguished from non-feasance. Mechem, in his work on agency (sec. 572), says: 'Some confusion has crept into certain cases from failure to observe clearly the distinction between non-feasance and misfeasance. As has been seen, the agent is not liable to strangers for injuries sustained by them because he did not undertake the performance of some duty which he owed to his principal and imposed upon him by his relation, which is non-feasance. Misfeasance may involve also, to some extent, the idea of not doing; as where the agent, while engaged in the performance of his undertaking, does not do something which it was his duty to do under the circumstances, — does not take that precaution, does not exercise that care, which a due regard for the rights of others requires. All this is not doing, but it is not the not doing of that which is imposed upon the agent merely by virtue of his relation, but of that which is imposed upon him by law as a responsible individual, in common with all other members of society. It is the same not doing which constitutes actionable negligence in any relation.' To the same effect are *Lottman* v. *Barnett*, 62 Mo. 159; *Martin* v. *Benoist*, 20 Mo. App. 263; *Harriman* v. *Stowe*, 57 Mo. 93; and *Bell* v. *Josselyn*, 3 Gray, 309; 63 Am. Dec. 741.

"A case parallel to that now in hand is *Campbell* v. *Portland Sugar Co.*, 62 Me. 552, 16 Am. Rep. 503, where agents of the

Portland Sugar Company had the charge and management of a wharf belonging to the company, and rented the same to tenants, agreeing to keep it in repair. They allowed the covering to become old, worn, and insecure, by means of which the plaintiff was injured. The court held the agents were equally responsible to the injured person with their principals.

"Wharton, in his work on negligence (sec. 535), insists that the distinction in this class of cases, between non-feasance and misfeasance, can no longer be sustained; that the true doctrine is, that when an agent is employed to work on a particular thing, and has surrendered the thing in question into the principal's hands, then the agent ceases to be liable to third persons for hurt received by them from such thing, though the hurt is remotely due to the agent's negligence, the reason being that the causal relation between the agent and the person hurt is broken by the interposition of the principal as a distinct center of legal responsibilities and duties, but that wherever there is no such interruption of causal connection, and the agent's negligence directly injures a stranger, the agent having liberty of action in respect to the injury, then such stranger can recover from the agent damages for the injury. The rule, whether as stated by Mechem or Wharton, is sufficient to charge appellants with damages, under the circumstances disclosed in this record. They had the same control of the premises in question as the owner would have had if he had resided in Chicago and attended to his own leasing and repairing. In that respect, appellants remained in control of the premises until the door fell upon the deceased. There was no interruption of the causal relation between them and the injured man. They were in fact, for the time being, substituted in the place of the owner, so far as the control and management of the property was concerned. The principle that makes an independent contractor, to whose control premises upon which he is working are surrendered, liable for damages to strangers, caused by his negligence, although he is at the time doing the work under contract with the owner (Wharton on Negligence, sec. 440), would seem to be sufficient to hold appellants. The owner of cattle who places them in the hands of an agister is not liable for damages committed by them while they are under the control of the agister. It is the possession and control of the cattle which fix the liability, and the law imposes upon the agister the duty to protect

strangers from injury by them: *Ward* v. *Brown*, 64 Ill. 307; 16 Am. Rep. 561; *Ozburn* v. *Adams*, 70 Ill. 291.

"When appellants rented the premises to Mrs. Wheeler, in the dangerous condition shown by the evidence, they voluntarily set in motion an agency which, in the ordinary and natural course of events, would expose persons entering the barn to personal injury. Use of the barn for the purpose for which it was used when the deceased came to his death was one of its ordinary and appropriate uses, and might, by ordinary foresight, have been anticipated. If the insecure condition of the door fastenings had arisen after the letting to Mrs. Wheeler, a different question would be presented; but as it existed before and at the time of the letting, the owner or persons in control are chargeable with the consequences: *Gridley* v. *Bloomington*, 68 Ill. 47; *Tomle* v. *Hampton*, 129 Ill. 379.

"Neither error is well assigned, and the judgment is affirmed."

L. H. Boutell, for the appellants.

Cameron and Hughes, for the appellee.

Per CURIAM. We fully concur in the legal proposition asserted in the foregoing opinion, and deem it unnecessary to add to what is therein said in support of that proposition.

The judgment is affirmed.

PERSONAL LIABILITY OF AGENT TO THIRD PERSONS. — In discussing the question of the liability of agents to third persons, it will be convenient to consider such liability, — 1. In contract; and 2. In tort.

1. IN CONTRACT. — The primary object in view in the creation of an agency is to authorize the agent to act for and in behalf of his principal. It is therefore the duty of the agent to so act as to bind his principal, and not himself, to third persons, and to bind third persons to the principal, and not to himself: Mechem on Agency, sec. 408.

WHERE AGENT CONTRACTS PERSONALLY, OR CONCEALS HIS AGENCY. — Although an agent is presumed to intend to bind his principal, it is undoubtedly competent for him to make himself personally responsible if he desires to do so, even when he has authority to bind his principal. And if he conceals the fact of his agency, and contracts as the ostensible principal, he will be held liable in the same manner and to the same extent as though he were the real principal: Mechem on Agency, secs. 554, 558; Story on Agency, sec. 269; Ewell's Evans on Agency, 409; *Brent* v. *Miller*, 81 Ala. 309; *Hall* v. *Crandall*, 29 Cal. 567; 89 Am. Dec. 64; *Murphy* v. *Helmrich*, 66 Cal. 69; *Hewes* v. *Andrews*, 12 Col. 161; *Mackey* v. *Briggs*, Sup. Ct. Col., Feb., 1891; *Johnson* v. *Smith*, 21 Conn. 627; *Pierce* v. *Johnson*, 34 Conn. 274; *Garrard* v. *Moody*, 48 Ga. 96; *Wheeler* v. *Reed*, 36 Ill. 82; *Bickford* v. *First Nat. Bank*, 42 Ill. 238; 89 Am. Dec. 436; *Merrill* v. *Wilson*, 6 Ind. 426; *Nixon* v. *Downey*, 49 Iowa, 166; *York County Bank* v. *Stein*, 24 Md. 447; *Guernsey* v.

Cook, 117 Mass. 548; *Welch* v. *Goodwin*, 123 Mass. 71; 25 Am. Rep. 24; *Bartlett* v. *Raymond*, 139 Mass. 275; *McClellan* v. *Parker*, 27 Mo. 162; *Bridges* v. *Bidwell*, 20 Neb. 185; *Batchelder* v. *Libbey*, Sup. Ct. N. H., March, 1890; *McComb* v. *Wright*, 4 Johns. Ch. 659; *Mills* v. *Hunt*, 20 Wend. 431; *Baltzen* v. *Nicolay*, 53 N. Y. 467; *Cobb* v. *Knapp*, 71 N. Y. 348; 27 Am. Rep. 51; *Argersinger* v. *Macnaughton*, 114 N. Y. 535; 11 Am. St. Rep. 687; *Forney* v. *Shipp*, 4 Jones, 527; *Beymer* v. *Bonsall*, 79 Pa. St. 298; *Davenport* v. *O'Hear*, 2 McCord, 198; *Conyers* v. *Magrath*, 4 McCord, 392; *Royce* v. *Allen*, 28 Vt. 234; *Baldwin* v. *Leonard*, 39 Vt. 260; 94 Am. Dec. 324; *Button* v. *Winslow*, 53 Vt. 430; *Poole* v. *Rice*, 9 W. Va. 73; *Ye Seng Co.* v. *Corbitt*, 9 Fed. Rep. 423; *Magee* v. *Atkinson*, 2 Mees. & W. 440; *Higgins* v. *Senior*, 8 Mees. & W. 834. And where an agent has thus made himself liable as a principal, the fact that he has added to his signature the word "agent" will not relieve him from personal liability. Such word will be treated as merely a *descriptio personæ*: *Bickford* v. *First Nat. Bank*, 42 Ill. 238; 89 Am. Dec. 436; *Bryson* v. *Lucas*, 84 N. C. 680; 37 Am. Rep. 634; Mechem on Agency, sec. 558. The duty is upon an agent who would avoid personal liability to disclose his agency, and not upon others to discover it; and if he fails to do so, and deals with persons unaware of his agency, he must answer personally for the debts he contracts: *Baldwin* v. *Leonard*, 39 Vt. 260; 94 Am. Dec. 324; Mechem on Agency, sec. 554. In delivering the opinion of the court in *Cobb* v. *Knapp*, 71 N. Y. 348, Church, C. J., said: "It is not sufficient that the seller may have the means of ascertaining the name of the principal. If so, the neglect to inquire might be deemed sufficient. He must have actual knowledge. There is no hardship in the rule of liability against agents. They always have it in their power to relieve themselves, and when they do not, it must be presumed that they intend to be liable."

WHEN AGENT, BELIEVING HIMSELF TO BE AUTHORIZED, ACTS UNDER INNOCENT MISTAKE. — Where an agent, believing in good faith that he has authority to act in the given matter for his principal, expressly represents to the person with whom he deals that he has such authority, he will be personally responsible to such person for any damages which the latter may sustain because of such want of authority. And he is not relieved from such liability by the fact that he acted in good faith. However innocent his intention may have been, he has done a wrong to another from which injury has resulted, and it is but just that he should be personally responsible for the consequences of his act, rather than that the injury should be borne by the other party, who has been misled by his assertion of authority: Mechem on Agency, sec. 542; Story on Agency, sec. 264; *Smout* v. *Ilbery*, 10 Mees. & W. 1; *Godwin* v. *Francis*, L. R. 4 Com. P. 295; *Jefts* v. *York*, 10 Cush. 392; *Bartlett* v. *Tucker*, 104 Mass. 336; 6 Am. Rep. 240; *Kroeger* v. *Pitcairn*, 101 Pa. St. 311; 47 Am. Rep. 718; *Bank of Hamburg* v. *Wray*, 4 Strob. 87; 51 Am. Dec. 659. And the same rule is applied although the agent makes no express representation as to his authority; for by undertaking to act as agent for another, he impliedly represents himself to be authorized to so act, and is personally liable to persons who may suffer injury from his assuming as true what he did not know to be true: Mechem on Agency, sec. 545.

WHERE AGENT MAKES FALSE REPRESENTATION OF AUTHORITY WITH INTENT TO DECEIVE. — If an agent, knowing that he has no authority to act for a principal, falsely represents that he has such authority, with intent to deceive and mislead the person with whom he deals, and such person is thereby deceived and misled to his injury, the agent will be personally liable for such

injury: Mechem on Agency, sec. 543; *Smout* v. *Ilbery*, 10 Mees. & W. 1; *Godwin* v. *Francis*, L. R. 4 Com. P. 295; *Kroeger* v. *Pitcairn*, 101 Pa. St. 311; 47 Am. Rep. 718; *Bank of Hamburg* v. *Wray*, 4 Strob. 87; 51 Am. Dec. 659.

AGENT DISCLOSING ALL FACTS NOT LIABLE. — An agent who, at the time of the transaction, fully discloses to the party with whom he is dealing all the facts and circumstances relating to the authority under which he assumes to act for his principal, so that such party has full knowledge of the facts, will not be personally liable: *Ware* v. *Morgan*, 67 Ala. 461; *Ogden* v. *Raymond*, 22 Conn. 379; 58 Am. Dec. 429; *Newman* v. *Sylvester*, 42 Ind. 112; *Murray* v. *Carothers*, 1 Met. (Ky.) 71; *Humphrey* v. *Jones*, 71 Mo. 62; *Michael* v. *Jones*, 84 Mo. 578; *Western Cement Co.* v. *Jones*, 8 Mo. App. 373; *Hall* v. *Lauderdale*, 46 N. Y. 70; *Chase* v. *Pattberg*, 12 Daly, 171; *McCurdy* v. *Rogers*, 21 Wis. 197; 91 Am. Dec. 468. Where all the facts are known to both parties, and the mistake is one of law as to the liability of the principal, the fact that the principal cannot be held is no ground for charging the agent with liability: *Michael* v. *Jones*, 84 Mo. 578.

PUBLIC AGENT DISCLOSING HIS AUTHORITY NOT PERSONALLY LIABLE. — An agent contracting on behalf of government is not liable to third persons, even though he would have been liable under the terms of his contract had he been acting as agent of a private person. The presumption is, that he is acting officially, not personally. A person dealing with a public agent, knowing him to be such, is presumed to know the nature and extent of his authority. A public agent is not personally liable on a contract made by him for the public, unless his intention to bind himself is clearly apparent. A very strong case is required to hold such an agent personally liable: Mechem on Agency, sec. 547; Story on Agency, sec. 302; *New York etc. Co.* v. *Harbison*, 16 Fed. Rep. 688; *Ogden* v. *Raymond*, 22 Conn. 379; 58 Am. Dec. 429; *Murray* v. *Carothers*, 1 Met. (Ky.) 71; *Stinchfield* v. *Little*, 1 Greenl. 231; 10 Am. Dec. 65; *Simonds* v. *Heard*, 23 Pick. 120; 34 Am. Dec. 41; *Sanborn* v. *Neal*, 4 Minn. 126; 77 Am. Dec. 502; *Woodbridge* v. *Hall*, 47 N. J. L. 388; *Walker* v. *Swartwout*, 12 Johns. 444; 7 Am. Dec. 334; *Belknap* v. *Reinhart*, 2 Wend. 375; 20 Am. Dec. 621; *Miller* v. *Ford*, 4 Rich. 376; 55 Am. Dec. 687; *McCurdy* v. *Rogers*, 21 Wis. 197; 91 Am. Dec. 468. But if such an agent denies to the government that he has made a contract on its behalf, and thereby deprives the party with whom he contracted of his remedy against the government, he will be held personally liable, for he has disavowed his character of public agent: *Freeman* v. *Otis*, 9 Mass. 272; 6 Am. Dec. 66.

WHETHER AGENT FAILING TO BIND HIS PRINCIPAL BINDS HIMSELF. — In some early New York cases the rule was laid down that if an agent does not bind his principal he binds himself personally; and this rule has been followed in a few instances in other states: *Dusenbury* v. *Ellis*, 3 Johns. Cas. 70; 2 Am. Dec. 144; *White* v. *Skinner*, 13 Johns. 307; 7 Am. Dec. 381; *Mott* v. *Hicks*, 1 Cow. 513; 13 Am. Dec. 550; *Stone* v. *Wood*, 7 Cow. 453; 17 Am. Dec. 529; *Rossiter* v. *Rossiter*, 8 Wend. 494; 24 Am. Dec. 62; *Pentz* v. *Stanton*, 10 Wend. 271; 25 Am. Dec. 558; *Collins* v. *Allen*, 12 Wend. 356; 27 Am. Dec. 130; *Gillaspie* v. *Wesson*, 7 Port. 454; 31 Am. Dec. 715; *Dale* v. *Donaldson L. Co.*, 48 Ark. 188; 3 Am. St. Rep. 224; *McClenticks* v. *Bryant*, 1 Mo. 598; 14 Am. Dec. 310; *Underhill* v. *Gibson*, 2 N. H. 352; 9 Am. Dec. 88. But these early cases in New York have been very much modified, if not entirely overruled, by the later decisions of the court of appeals: *Dung* v. *Parker*, 52 N. Y. 494; *Baltzen* v. *Nicolay*, 53 N. Y. 467. Mechem says, on this subject: "The rule, sometimes asserted, that wherever the agent fails to create

a right of action against his principal upon the contract, he makes himself liable thereon, cannot therefore be sustained as a general rule": Mechem on Agency, sec. 550. And Ellsworth, J., delivering the opinion of the court in *Ogden* v. *Raymond*, 22 Conn. 379, 58 Am. Dec. 429, referring to this rule, said: "This rule needs qualification, and cannot be said to be universally true or correct, as the cases already cited abundantly show. If the form of the contract is such that the agent personally covenants, and then adds his representative character, which he does not in truth sustain, his covenant remains personal and in force, and binds him as an individual; but if the form of the contract is otherwise, and the language, when fairly interpreted, does not contain a personal undertaking or promise, he is not personally liable; for it is not his contract, and the law will not force it upon him. He may be liable, it is true, for tortious conduct if he has knowingly or carelessly assumed to bind another without authority, or when making the contract has concealed the true state of his authority, and falsely led others to repose in his authority; but as we have said, he is not, of course, liable on the contract itself, nor in any form of action whatever." In Maine, the rule has been modified by statute so as to make the intention of the parties as ascertained from the contract the rule of construction: *Andrews* v. *Estes*, 11 Me. 267; 26 Am. Dec. 521. And it seems to be now well settled that an agent is only liable on the contract when he has used apt words to charge himself personally, or has expressly made himself responsible, or where the credit was given to him personally: *Hall* v. *Crandall*, 29 Cal. 567; 89 Am. Dec. 64; *Lander* v. *Castro*, 43 Cal. 497; *Wallace* v. *Bentley*, 77 Cal. 19; 11 Am. St. Rep. 231; *Ogden* v. *Raymond*, 22 Conn. 379; 58 Am. Dec. 429; *Duncan* v. *Niles*, 32 Ill. 532; 83 Am. Dec. 293; *Newman* v. *Sylvester*, 42 Ind. 106; *Stetson* v. *Patten*, 2 Greenl. 358; 11 Am. Dec. 111; *Sheffield* v. *Ladue*, 16 Minn. 388; 10 Am. Rep. 145; *McCurdy* v. *Rogers*, 21 Wis. 197; 91 Am. Dec. 468; Mechem on Agency, sec. 550. An agent is, of course, liable personally on a contract which shows an intention on his part to bind himself personally: *Pitman* v. *Kintner*, 5 Blackf. 250; 33 Am. Dec. 469; *Simonds* v. *Heard*, 23 Pick. 120; 34 Am. Dec. 41.

AGENT FOR FOREIGN PRINCIPAL, WHETHER PERSONALLY LIABLE. — It was formerly held that where the principal was a resident of a foreign state or country, credit was presumed to be given to the agent personally, even where he disclosed his agency: *McKenzie* v. *Nevius*, 22 Me. 138; 38 Am. Dec. 291; *New Castle Mfg. Co.* v. *Red River R. R. Co.*, 1 Rob. (La.) 145; 36 Am. Dec. 686. In delivering the opinion of the court in *McKenzie* v. *Nevius*, 22 Me. 138, 38 Am. Dec. 291, Tenney, J., said: "By the usage of trade, a rule may be considered as established that agents or factors acting for merchants resident in a foreign country are held personally liable for contracts made by them for their employers, notwithstanding they fully disclose at the time the character in which they act. This arises from the consideration that the merchant abroad, and his ability to discharge his obligations, may be unknown to those who assume pecuniary responsibility, or make advances, or perform services on his account; the presumption is, that the credit is given exclusively to the foreigner's agent, unless rebutted by an agreement, express or implied, and that the party dealing with the agent intends to trust one who is known to him and resides in the same country, and subject to the same laws as himself, rather than trust to one who, if known, cannot, from his residence in a foreign country, be amenable to those laws, and whose ability may be affected by local institutions and local exemptions, which may put at hazard both his rights and his reme-

dies." This doctrine was formulated by Judge Story in his work on agency, section 268; but in later editions, a material modification of the section was added, in these words: "Probably the better rule is, that the agent of a foreign principal is not, as a question of law, personally liable on every contract made for his principal. It is rather a question of fact in each case, — a question of intention, to be ascertained by the terms of the particular contract and the surrounding circumstances." And Mechem says the old rule "no longer prevails in this country, and the contracts of agents in behalf of foreign principals stand upon the same ground as those made for domestic employers": Mechem on Agency, sec. 556. The following authorities support the modern rule: *Oelricks* v. *Ford*, 23 How. 49; *Maury* v. *Ranger*, 38 La. Ann. 485; 58 Am. Rep. 197; *Rogers* v. *March*, 33 Me. 106; *Bray* v. *Kettell*, 1 Allen, 80; *Goldsmith* v. *Manheim*, 109 Mass. 187.

AGENT PAYING OVER MONEY TO HIS PRINCIPAL, WHETHER PERSONALLY LIABLE. — If money has been voluntarily and by mistake paid to an agent, and before he receives notice of the mistake he has paid it over to his principal, he will not be personally liable therefor. But if, after being apprised of the mistake and notified not to pay it, he pays it over to the principal, he will be personally liable: Mechem on Agency, sec. 561; *Elliott* v. *Swartwout*, 10 Pet. 137; *Shepard* v. *Sherin*, 43 Minn. 382; *Jefts* v. *York*, 12 Cush. 196; *La Farge* v. *Kneeland*, 7 Cow. 456.

2. IN TORT. — In delivering the opinion of the court in *Berghoff* v. *McDonald*, 87 Ind. 549, 558, Franklin, C., said: "In torts, the relation of principal and agent does not exist; they are all wrong-doers, and may be sued jointly or separately; and the liability of each and all does not cease until payment has been made, or satisfaction rendered, or something equivalent thereto." And Sanford, J., in delivering the opinion of the court in *Bennett* v. *Ives*, 30 Conn. 329, 334, said: "The actual perpetrator of a positive and obvious wrong can never exonerate himself from personal liability by showing that he was acting as the agent or servant of another." A principal cannot confer upon an agent authority to commit a tort upon the rights or property of another. And in an action of tort against an agent, it is no defense that the defendant acted as the agent of another. If the principal is a wrong-doer, the agent is a wrong-doer also: *Kimball* v. *Billings*, 55 Me. 147; 92 Am. Dec. 581; *McPheters* v. *Page*, 83 Me. 234; *Malone* v. *Morton*, 84 Mo. 436; *Crane* v. *Onderdonk*, 67 Barb. 47; *Phelps* v. *Wait*, 30 N. Y. 78.

NON-FEASANCE AND MISFEASANCE OF AGENT, PERSONAL LIABILITY FOR. — It seems to have been a rule of the common law that an agent is liable personally to third persons for acts of misfeasance, but that for non-feasance he is liable only to his principal: Story on Agency, sec. 308; Mechem on Agency, sec. 569; *Carey* v. *Rochereau*, 16 Fed. Rep. 87; *Delaney* v. *Rochereau*, 34 La. Ann. 1123; 44 Am. Rep. 456; *Feltus* v. *Swan*, 62 Miss. 415; *Bissell* v. *Roden*, 34 Mo. 63; 84 Am. Dec. 71; *Labadie* v. *Hawley*, 61 Tex. 177; 48 Am. Rep. 278. In the case of *Bell* v. *Josselyn*, 3 Gray, 309, 63 Am. Dec. 741, Metcalf, J., in delivering the opinion of the court, thus defines non-feasance and misfeasance: "Non-feasance is the omission of an act which a person ought to do; misfeasance is the improper doing of an act which a person might lawfully do." Story says that the distinction between misfeasance and non-feasance "may seem nice and artificial, and partakes, perhaps, not a little of the subtlety and over-refinement of the old doctrines of the common law": Story on Agency, sec. 309. Mechem says that "some confusion has crept into certain cases from a failure to observe clearly the distinction between

non-feasance and misfeasance." With due respect for the learned author's judgment, we venture the assertion that the confusion has arisen from the inability of the ordinary mind to comprehend the refined distinction to which he refers. But whatever the fact may have arisen from, it is evident that there are two lines of decision upon the subject under discussion, which it seems to be impossible to reconcile. In *Delaney* v. *Rochereau*, 34 La. Ann. 1123, 44 Am. Rep. 456, it was decided that an agent having the possession, control, and administration of the real estate of a non-resident owner is not liable for an injury sustained by a third person by reason of the agent's neglect to keep the same in safe repair. The decision in this case was expressly put upon the ground that the agent was not liable to third persons for non-feasance. See, to the same effect, *Carey* v. *Rochereau*, 16 Fed. Rep. 87, in deciding which Pardee, J., said: "It is very doubtful if an agent, *per se*, is liable to third persons on any account. A person acting as agent for another is liable for his own misfeasance, but this results, not from the agency, but in spite of it." In the case of *Feltus* v. *Swan*, 62 Miss. 415, it was decided that an agent who had charge of a plantation was not liable to the owner of an adjoining plantation for injuries caused by the neglect and refusal of the agent to keep open a drain which it was his duty to his principal to keep open. And it was held that the fact that the agent's motive in failing and refusing to perform his duty was malicious, and that he intended thereby to injure such adjoining owner, was immaterial. Campbell, C. J., who delivered the opinion of the court in that case, said: "Whatever motive operated on the agent, the charge against him was only that he failed to do, and not that he had done anything maliciously; and for non-feasance or omission to act at all, the agent is answerable only to his employer."

On the other hand, it was decided in the case of *Campbell* v. *Portland Sugar Co.*, 62 Me. 552, 16 Am. Rep. 503, that agents who had charge and control of a wharf, and had agreed to keep it in repair, were liable to a third person for an injury sustained by him by reason of the defective condition of the wharf. Barrows, J., who delivered the opinion of the court in that case, said: "It is the actual personal negligence of the agents which constitutes the constructive negligence of the corporation. The corporation acts through and by them, and they act for the corporation, and when their acts or neglects result in injury to third parties, they are eqeally responsible with their principals." In *Ellis* v. *McNaughton*, 76 Mich. 237, 15 Am. St. Rep. 308, it was decided that an agent who has entire control of premises and of the erection of a building for his principal is liable for injuries resulting to third persons from the removal of a walk on the premises by one of his employees, contrary to his orders, if, after such removal, he knew of the dangerous condition of the premises and allowed them to remain in that condition. In delivering the opinion of the court in this case, Morse, J., said: "Misfeasance may involve, to some extent, the idea of not doing; as where an agent, while engaged in the performance of his undertaking, does not do something which it was his duty to do, under the circumstances."

We have no hesitation in expressing our preference for the decision of the supreme court of Illinois in the principal case, and for the decisions of the Michigan and Maine courts in the above cases, over those of the Louisiana and Mississippi cases referred to above, but it seems to us of doubtful utility to claim that non-feasance is in any case misfeasance. It seems to us that a much sounder and more logical basis for holding the agent personally liable in such cases is stated in the following extract: "Every one, whether he is principal or agent, is responsible directly to persons injured by his own neg-

ligence in fulfilling obligations resting upon him in his individual character. These obligations are those which the law imposes upon all persons, independent of contract. No man can increase or diminish his obligations to strangers by becoming an agent; but if in the course of his agency he comes in contact with the person or property of a stranger, he is liable for any injury he may do to either by his negligence in respect to duties imposed by law upon him in common with all other men": Shearman and Redfield on Negligence, sec. 112. See also Wharton on Negligence, sec. 535.

AGENT PERSONALLY LIABLE FOR MISFEASANCE. — All the authorities agree that an agent is personally liable to third persons for injuries resulting from his misfeasance. An agent, like every other person, is bound, in the performance of his duty to his principal, to recognize and respect the rights of others; and if he fails to do this, and causes injury to third persons, he will be liable therefor, whether his failure was negligent or intentional: Mechem on Agency, sec. 571; *Bennett* v. *Ives*, 30 Conn. 329; *Reed* v. *Peterson*, 91 Ill. 288; *Berghoff* v. *McDonald*, 87 Ind. 549; *Poole* v. *Adkisson*, 1 Dana, 110; *Campbell* v. *Hillman*, 15 B. Mon. 508; 61 Am. Dec. 195; *Campbell* v. *Portland Sugar Co.*, 62 Me. 552; 16 Am. Rep. 503; *Bell* v. *Josselyn*, 3 Gray, 309; 63 Am. Dec. 741; *Nowell* v. *Wright*, 3 Allen, 169; 80 Am. Dec. 62; *Gilmore* v. *Driscoll*, 122 Mass. 199; 23 Am. Rep. 312; *Hedden* v. *Griffin*, 136 Mass. 229; 49 Am. Rep. 25; *Osborne* v. *Morgan*, 130 Mass. 102; 39 Am. Rep. 437; *Josselyn* v. *McAllister*, 22 Mich. 300; *Starkweather* v. *Benjamin*, 32 Mich. 306; *Weber* v. *Weber*, 47 Mich. 569; *Ellis* v. *McNaughton*, 76 Mich. 237; 15 Am. St. Rep. 308; *Harriman* v. *Stowe*, 57 Mo. 93; *Lottman* v. *Barnett*, 62 Mo. 159; *Martin* v. *Benoist*, 20 Mo. App. 262; *Jenne* v. *Sutton*, 43 N. J. L. 257; 39 Am. Rep. 578; *Crane* v. *Onderdonk*, 67 Barb. 47.

And in *Erwin* v. *Davenport*, 9 Heisk. 44, it was decided that where subordinate officers of government are guilty of direct misfeasances or positive wrongs to third persons in the discharge of their official functions, they incur the same personal responsibility, and to the same extent, as private agents.

PRINCIPAL'S KNOWLEDGE OR DIRECTION DOES NOT RELIEVE AGENT FROM PERSONAL LIABILITY. — It is, of course, no defense to an agent that he committed the tort with the knowledge or by the direction of his principal. No person can authorize another to commit a positive wrong against a third person: Mechem on Agency, sec. 573; *Lee* v. *Mathews*, 10 Ala. 682; 44 Am. Dec. 498; *Johnson* v. *Barber*, 5 Gilm. 425; 50 Am. Dec. 416; *Weber* v. *Weber*, 47 Mich. 569; *Baker* v. *Wasson*, 53 Tex. 157.

CHICAGO AND EASTERN ILLINOIS R. R. CO. v. HINES.

[132 ILLINOIS, 161.]

PRACTICE — MOTION IN ARREST OF JUDGMENT CANNOT BE MADE WHEN. — A party cannot move in arrest of judgment in the trial court, after judgment of that court upon a demurrer presenting the same objection to the declaration. But under the Illinois Practice Act, if any counts of a declaration are so defective as not to support the judgment, the court may disregard the faulty counts, or render judgment thereon for the defendant.

DEFECT IN PLEADING CURED BY VERDICT WHEN. — A verdict will aid a defective statement of title, but will never assist a statement of a defective title or cause of action. Where there is a defect, imperfection, or omission in a pleading, either in substance or in form, which would have been a fatal objection upon demurrer, yet if the issue joined be such as necessarily required, on the trial, proof of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give, or the jury would have given, the verdict, such defect, imperfection, or omission is cured by the verdict.

INDIVIDUAL IS CHARGEABLE WITH KNOWLEDGE OF HIS DUTY. — In the law of personal liability for the consequences of action or non-action, the law charges the individual with a knowledge of his duty. When, therefore, a declaration alleges that it was the duty of an individual or corporation to do or not to do a given thing, it is necessarily implied from that allegation that the individual or corporation knew that it was his or its duty to do or not to do the given thing.

DECLARATION NEED NOT ALLEGE THAT CORPORATION KNOWS WHAT IT HAS OR HAS NOT DONE. — Since all accountable persons know what they do or do not do, it is no more necessary to allege in a declaration that a corporation knows what it has done or has not done, than it is to allege the same thing with regard to an individual; for the acts or non-acts of the servants of a corporation, within the sphere of their duty, are its acts or non-acts. And therefore, in an action against a railway company to recover damages for personal injuries alleged to have been received by one of its servants from its failure to fill in the spaces between the ties of its road with cinders or other substance, it is sufficient for the declaration to allege that it was the duty of the company to have filled such spaces, and it is not necessary to allege that the defendant knew of such defects in the construction of its track, switches, etc.

ALLEGATION IN DECLARATION OF DUE CARE NEGATIVES NEGLIGENCE ON PLAINTIFF'S PART. — In an action against a master to recover damages for personal injuries alleged to have been sustained by a servant through the negligence of the master, an allegation in the declaration that the servant used due care negatives negligence on his part, and, by implication, that he had knowledge of the defects by reason of which he was injured; and the jury, by finding the master guilty of negligence, impliedly find that the servant had no knowledge of such defects, and was not guilty of contributory negligence. Besides, it is a matter of defense that the servant knew of the defects which caused his injury, and such knowledge will not be presumed.

SINGLE INSTRUCTION NEED NOT CONTAIN WHOLE LAW OF CASE. — The entire law of the case need not be stated in a single instruction, but the

law as applicable to particular questions or to particular parts of the case may be properly stated in separate instructions; and if there is no conflict in the law as stated in different instructions, and all the instructions, considered as a series, present the law applicable to the case fully and accurately, it is sufficient.

SERVANT AUTHORIZED TO RELY ON MASTER'S FURNISHING SAFE APPLIANCES. — The burden of furnishing safe machinery, appliances, surroundings, etc., is upon the master; and while he is not to be held liable for defects and dangers of which the servant is fully informed, yet the servant is authorized to rely upon the acts of the master in that respect, and is under no primary obligation to investigate and test the fitness and safety of the machinery, surroundings, etc., in the absence of notice that there is something wrong in that respect, especially where the servant's duties require constant attention to other matters.

ACTION to recover damages for negligence resulting in death. The opinion states the case.

W. H. Lyford, for the appellant.

Barnum, Evans, and Barnum, for the appellee.

SCHOLFIELD, J. The only question discussed in the argument prepared by appellant's counsel for this court is, whether appellee's declaration is sufficient to sustain the judgment, though other questions were discussed in the argument prepared by him for the appellate court, and copies of that argument are presented to us with the argument prepared for this court.

The action is for negligence resulting in the death of appellee's intestate, who was, at the time of the alleged negligence, in appellant's employ, as a switchman in its yards. Appellant demurred to the declaration, and upon motion of appellant's counsel the demurrer was overruled. Appellant then pleaded the general issue. After the verdict of the jury in favor of appellee was returned into court, appellant moved in arrest of judgment because of the insufficiency of the declaration. The court overruled the motion, and that ruling, among others, was assigned for error in the appellate court. It was also assigned for error in that court that the trial court erred in rendering judgment for the plaintiff. Both of these assignments of error are renewed in this court.

The general common-law rule is, that where a declaration is so defective that it will not sustain the judgment, the objection may be availed of on motion in arrest in the trial court, or on error in the appellate court: *Wilson* v. *Myrick*, 26 Ill. 35; *Schofield* v. *Settley*, 31 Ill. 515; *Haynes* v. *Lucas*, 50 Ill. 436;

Kipp v. *Lichtenstein*, 79 Ill. 358; *Culver* v. *Third Nat. Bank*, 64 Ill. 532. An exception to so much of the rule as relates to the trial court is, a party cannot move in arrest of judgment in the trial court, after judgment of that court, upon a demurrer presenting the same objection: *American Exp. Co.* v. *Pickney*, 29 Ill. 392; *Quincy Coal Co.* v. *Hood*, 77 Ill. 68; *De Wolf* v. *McGinnis*, 106 Ill. 553; *Independent Order of Mut. Aid* v. *Paine*, 122 Ill. 625. There is an expression in *Stearns* v. *Cope*, 109 Ill. 346, not in harmony with these cases; but the case was decided correctly, and the expression was unnecessary and inadvertent. Under our Practice Act, this rule is more a matter of form than of substance, since we have held that under it, if any counts of the declaration are so defective as not to support the judgment, the court may disregard the faulty counts, or render judgment thereon for the defendant: *Smalley* v. *Edey*, 19 Ill. 211; *People* v. *Spring Valley*, 129 Ill. 178.

As a matter of technical practice, it is clear, from the authorities cited *supra*, we cannot hold that the circuit court, after having overruled a demurrer to the declaration, erred in not sustaining the motion in arrest. But the record being before us upon error, we may inquire whether the declaration is sufficient to sustain the judgment. In addition to cases cited *supra*, see 2 Tidd's Practice, 4th Am. ed., 1193. The rule is, that a verdict will aid a defective statement of title, but will never assist a statement of a defective title or cause of action: 1 Chitty's Pleading, 7th Am. ed., 722, *723. And the same author also says: "Where there is any defect, imperfection, or omission in any pleading, whether in substance or in form, which would have been a fatal objection upon demurrer, yet if the issue joined be such as necessarily required, on the trial, proof of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give, or the jury would have given, the verdict, such defect, imperfection, or omission is cured by the verdict": 1 Chitty's Pleading, 712, *713. See also Gould's Pleading, sec. 13.

There are two counts in this declaration. In the first, the substantial allegations, omitting the commencement and conclusion, are as follows: "Then and there it became and was the duty of the said defendant to said John Hines to keep and maintain its yard in a safe and proper condition, so as not to expose the said John Hines to any unnecessary expos-

ure to danger or liability to accident, and it was then and there defendant's duty to have filled in the space between the ties of its said railroad track with cinders or some other substance, so that in walking in and upon the said track one would not be exposed to unnecessary danger or liability to stumble upon or between said ties; but the said defendant, not regarding its duty in that behalf, then and there permitted its yard to be and remain in unsafe repair and condition, and then and there permitted the ties of its said railroad track to be and remain above the surface of the ground, and the space between the said ties was not filled in with cinders or any other substance, and thereby, then and there, the said John Hines, while coupling cars, as aforesaid, in pursuance of said employment by the defendant, was then and there exposed to unnecessary danger and liability to accident, and then and there, while engaged in coupling cars on the side-track of the defendant, as aforesaid, and while using all due care and diligence on his part, in the night-time, caught his foot between two of the ties of which the side-track was constructed, and then and there, necessarily and unavoidably, tripped and fell through and upon the side-track, and one of the cars of the defendant, which the said Hines was then and there engaged in coupling, then and there passed over the body of said Hines, by means whereof he was then and there killed." The second count differs from the first in alleging the duty of the defendant to "not leave any space between the ties of its said track and the switch-bar connecting the rails of its side-track," and that the defendant "permitted a wide space between the ties of said track and the switch-bar connecting the rails of said track." The objections urged to the declaration are, that it is neither averred that the defendant knew of, nor that the plaintiff did not know of, the defects in the construction of the tracks, switches, etc., alleged.

1. But it is fundamental in the law of personal liability for the consequences of action or non-action that the law charges the individual with a knowledge of his duty: Wharton on Negligence, 1st ed., secs. 412 et seq. Hence, when it is alleged that it was the duty of an individual or corporation to do or to not do a given thing, it is necessarily implied from that allegation that the individual or corporation knew that it was its duty to do or to not do the given thing: Bishop on Non-contract Law, sec. 526, and cases cited. So, also, all accountable persons know what they do or do not do; and it is obviously no more

necessary to allege that a corporation knows what it has done, or has not done, than it is to allege the same thing with regard to an individual; for the acts or non-acts of the servants of the corporation, within the sphere of their duty, are its acts or non-acts: Pierce on Railroads, 277; Bishop on Non-contract Law, sec. 647; Shearman and Redfield on Negligence, 2d ed., 68. "Filling in the spaces between the ties" of defendant's railroad tracks with "cinders or some other substance" is an affirmative act. Accepting, as we must, from the allegation, that it was the duty of the defendant to do this affirmative act, its omission was palpably a failure of duty in construction, for which it is liable to the plaintiff: *Village of Jefferson* v. *Chapman*, 127 Ill. 438; 11 Am. St. Rep. 136. So, also, the allegation with regard to permitting the space to exist between the ties of the track and the switch-bar connecting the rails implies knowledge in the defendant; for permitting denotes an assent, either expressly or impliedly.

2. The allegation of due care in the deceased negatives negligence, and, by implication, that he had knowledge of the defects by reason of which he was injured. And so the jury must have found, in finding the defendant guilty, that the deceased was not guilty of contributory negligence. The allegation is therefore sufficient on error, if, indeed, it should be admitted that it would not be so on demurrer: *Illinois Central R. R. Co.* v. *Simmons*, 38 Ill. 242. But it is matter of defense that the deceased had knowledge of the defects through which his injury was received. Unless it shall appear from the evidence that he had such knowledge, it will not be presumed, since no one is presumed to knowingly incur physical pain and death, where he can avoid it at his discretion: See *Chicago and Northwestern R'y Co.* v. *Coss*, 73 Ill. 394; *Wabash, St. Louis, and Pacific R'y Co.* v. *Shacklet*, 105 Ill. 364; 44 Am. Rep. 791. There was therefore no error in the ruling of the appellate court in holding the declaration sufficient to sustain the judgment.

We find no error in the ruling of the trial court upon any question of law, and we concur in the views expressed by the appellate court in regard to the instructions: *Chicago etc. R. R. Co.* v. *Hines*, 33 Ill. App.

It is not required that the entire law of the case shall be stated in a single instruction, and it is therefore not improper to state the law as applicable to particular questions, or particular parts of the case, in separate instructions; and

if there is no conflict in the law as stated in different instructions, and all the instructions, considered as a series, present the law applicable to the case fully and accurately, it is sufficient.

The burden of furnishing safe machinery, appliances, surroundings, etc., is upon the master, and while the master is not to be held liable for defects and dangers of which the servant is fully informed, yet the servant is authorized to rely upon the acts of the master in that respect, and is under no primary obligation to investigate and test the fitness and safety of the machinery, surroundings, etc., in the absence of notice that there is something wrong in that respect: Shearman and Redfield on Negligence, 2d ed., sec. 95; Bishop on Non-contract Law, sec. 678; *Porter* v. *Hannibal etc. R. R. Co.*, 60 Mo. 160. And, necessarily, much more is the servant entitled to assume that his master has furnished him with suitable and safe materials, machinery, and surroundings, and relieved him of investigation and inquiry in that regard, where, as in the present instance, the performance of his duties requires constancy of attention to other matters. A man whose attention is constantly directed to moving cars, and their coupling and uncoupling, cannot possibly give much attention to the ties, switch-bars, etc., over which he may, from time to time, have to pass. If appellant has been wronged by the rulings below, it has been only upon the questions of fact, for which there can be no relief in this court.

The judgment is affirmed.

PLEADING, DEFECTS IN, CURED BY VERDICT: See *Johnson* v. *Missouri P. R'y Co.*, 96 Mo. 340; 9 Am. St. Rep. 351, and note. A defective pleading is not cured by verdict when there is an entire omission of a material allegation in the complaint: *Richards* v. *Travelers Ins. Co.*, 80 Cal. 505.

MASTER AND SERVANT — MASTER'S DUTY AS TO FURNISHING MACHINERY. — The master must furnish his servants with safe machinery and appliances; and they may presume that he has properly performed this duty: *Richmond etc. R. R. Co.* v. *Williams*, 86 Va. 165; 19 Am. St. Rep. 876, and note; *Krantz* v. *Long Island R'y Co.*, 123 N. Y. 1; 20 Am. St. Rep. 716, and note.

MASTER AND SERVANT — ACTIONS BY SERVANT FOR INJURIES. — To maintain an action against his master for injuries caused by defects in machinery or appliances, the servant must show fault or knowledge of such defects on the part of his master, and absence of fault on his own part: Note to *Nadau* v. *White River L. Co.*, 20 Am. St. Rep. 41; *Georgia R. R. etc. Co.* v. *Nelms*, 83 Ga. 70; 20 Am. St. Rep. 308, and note; *Prather* v. *Richmond*

etc. R. R. Co., 80 Ga. 427; *International etc. R. R. Co.* v. *Hester*, 72 Tex. 40; *Texas etc. R'y Co.* v. *Crowder*, 76 Tex. 501. An allegation that the plaintiff is free from negligence does not, however, take the place of an allegation showing that the risk was not one knowingly assumed as an incident of his service: *Louisville etc. R'y Co.* v. *Corps*, 124 Ind. 427.

WOOLVERTON *v.* TAYLOR.

[132 ILLINOIS, 197.]

PENAL STATUTE IS ONE WHICH IMPOSES A FORFEITURE OR PENALTY for transgressing its provisions, or for doing a thing prohibited.

PENALTY, WHAT CONSTITUTES. — A penalty is in the nature of punishment for the non-performance of an act or for the performance of an unlawful act, and involves the idea of punishment, whether enforced by a civil or criminal procedure.

CORPORATE INDEBTEDNESS EXCEEDING CAPITAL STOCK, LIABILITY OF OFFICERS CONTRACTING. — In the absence of statutory prohibition, it is not unlawful for the officers of a corporation to contract debts in excess of its capital stock, but it may, like individuals, contract debts to the full extent of its credit. The Illinois statute making the officers of corporations individually liable for contracting debts beyond a prescribed limit does not prohibit them from contracting indebtedness beyond the amount of their capital stock, nor does it inflict a penalty upon the officers for so doing. It simply gives to the creditors of corporations a new right of civil action against such officers.

EQUITY NEVER ENFORCES EITHER A PENALTY OR A FORFEITURE. — Where, therefore, a court decides that a certain liability created by statute can be enforced only in a court of equity, it, in effect, decides that the suit brought to enforce such liability is not for the recovery of a penalty.

SUIT TO ENFORCE INDIVIDUAL LIABILITY OF OFFICERS OF CORPORATION NOT SUIT FOR RECOVERY OF PENALTY. — A suit brought to enforce the individual liability of the officers of a corporation, imposed by section 16 of chapter 32 of the Revised Statutes of Illinois, is not a suit for the recovery of a penalty, within the meaning of section 14 of the Illinois statute of limitations.

LIABILITY OF CORPORATE OFFICERS FOR INCURRING DEBTS IN EXCESS OF CAPITAL STOCK ATTACHES WHEN. — The creditors of a corporation whose officers have incurred indebtedness in excess of its capital stock cannot proceed against such officers until such creditors have first obtained judgment against the corporation. The liability of such officers is, like that of a surety, *stricti juris*, and does not attach so long as the debts can be made out of the corporation, and no action can be maintained against them until the corporation is in default.

CREDITOR OF CORPORATION MAY FILE BILL AGAINST OFFICERS FOR INCURRING EXCESSIVE INDEBTEDNESS, THOUGH ALL DEBTS NOT DUE. — It does not follow that because a creditor of a corporation who files his bill against the officers of the corporation to enforce their individual liability for a debt incurred by them in excess of its capital stock must allege and prove the corporation in default as to his debt, he cannot maintain the bill until all debts against the corporation are due. On a

proper bill filed by a single creditor, the court has power to bring before it the corporation, all its officers who assented to the excessive indebtedness, as well as all its creditors, and ascertain the excess of the indebtedness over the capital stock, the amount of this to which each officer may have assented, and the extent to which the funds of the corporation may be resorted to for the payment of the debts, and also the number and names of the creditors, the amount of their several debts, to determine the sum to be recovered of the officers and apportioned among the creditors.

STATUTE OF LIMITATIONS BEGINS TO RUN FROM MATURITY OF THE DEBT sought to be recovered, and not from the date when it is created.

BILL in equity. The opinion states the case.

Consider H. Willett, for the appellants.

Edward W. Russell and Edward F. Gorton, for the appellees.

WILKIN, J. This was a bill in chancery, by appellants against appellees, to enforce an alleged liability against the said George H. Taylor and William H. Longley, as directors and president and treasurer of a corporation called "George H. Taylor & Co.," under section 16, chapter 32, of the Revised Statutes, entitled "Corporations." The bill is on behalf of appellants and all other creditors of said corporation who shall come in and contribute to the expense of the suit. It was filed in the superior court of Cook County on the twelfth day of January, 1888.

It appears from the allegations of the bill that said George H. Taylor & Co. was duly organized as a corporation, under the laws of this state, for the purpose of manufacturing, purchasing, and selling paper bags and other articles pertaining to the paper trade, and that while engaged in carrying on its said business it executed twelve certain promissory notes, payable to the order of Lucius Clark & Co. These notes were all executed more than five years prior to the filing of the bill, but between the dates of their maturity and the bringing of the suit less than five years had elapsed. They were for different amounts, running from $725 to $1,252, aggregating about $10,000. Prior to the filing of this bill, two of these notes had been assigned by said payees, Lucius Clark & Co., to the complainant Woolverton, four to the complainant the Northwestern National Bank of Chicago, and six to complainant Charles A. Clark. It is alleged in said bill that when said notes were executed, and the indebtedness for which they were given contracted, the defendant George H. Taylor was

director and president, and the said William H. Longley was director and treasurer, of said corporation, and at said time the indebtedness of said corporation exceeded its capital stock of fifty thousand dollars to the extent of one hundred thousand dollars, to which said Taylor and Longley, as such directors and president and treasurer, assented. It is also alleged in said bill that said corporation is insolvent, and has ceased to do business.

The statute of limitations having been set up by defendants, by way of demurrer to the bill, complainants, by leave of court, filed an amendment thereto, in which they alleged that they had no knowledge of the fact that the indebtedness of the said corporation exceeded its capital stock, until its financial failure and refusal to pay its debts, February 28, 1883, and that if any cause of action accrued to them at the date of said notes, the holders of the same at that time, and the complainants since, had no knowledge of the existence of such cause of action, which was fraudulently concealed from the holders of said notes by said defendants until February 28, 1883. To the bill as thus amended defendants again demurred, alleging, as special cause therefor, that it appeared upon the face of the bill that the cause of action sought to be enforced against them did not accrue within two years, nor within five years prior to the commencement of the suit. The superior court sustained the demurrer, and dismissed the bill at complainants' costs. The appellate court for the first district affirmed that decree, and complainants below again appealed.

The section of the statute under which the bill is filed is as follows: "If the indebtedness of any stock corporation shall exceed the amount of its capital stock, the directors and officers of such corporation assenting thereto shall be personally and individually liable for such excess to the creditors of such corporation." No question is made as to the sufficiency of the bill to charge appellees under this section had it been filed in apt time. The sole question for decision is, Do the facts stated in the bill bring the cause of action within the bar of the statute of limitations?

The demurrer is based upon two propositions, viz.: 1. The liability of appellees, if any exists, is for a statutory penalty, the cause of action against them accruing immediately upon their assenting to the excessive indebtedness, and therefore the two years' bar, under section 14, chapter 83, of the Re-

vised Statutes, entitled "Limitations," was complete when the bill was filed; 2. Although the liability is not penal, the cause of action accrued at the date of contracting the excessive indebtedness, and therefore the five years' bar under that clause of section 15, chapter 83, which provides that all civil actions not otherwise provided for shall be commenced within five years next after the cause of action accrued, had run before the bill was filed. To the first of these propositions appellants reply, the action is not for the recovery of a statutory penalty; and to the second, that the liability not being penal, the cause of action did not accrue until said notes became due, and therefore five years had not run when the bill was filed.

A penal statute is defined to be "one which imposes a forfeiture or penalty for transgressing its provisions, or for doing a thing prohibited": Potter's Dwarris on Statutes, 74. A penalty "is in the nature of punishment for the non-performance of an act, or for the performance of an unlawful act. It involves the idea of punishment, whether enforced by a civil or criminal procedure": Anderson's Law Dict. 763.

In the absence of statutory prohibition, it is not unlawful for the officers of a corporation to contract debts in excess of its capital stock. Unless restricted by statute, corporations, as individuals, may contract debts to the full extent of their credit, without reference to the amount of their capital stock. Neither is it, under all circumstances, bad management in a corporation to contract debts in excess of the amount of its capital stock. Its assets may be of such value as to give it credit, and warrant the incurring of liabilities far beyond that amount. While statutes in some states, by different forms of language, limit the right of such officers to contract indebtedness beyond prescribed limits, in others no restriction whatever has been enacted, and in many of those in which a limit is prescribed the indebtedness which may be contracted is not limited by the amount of capital stock, but may equal twice or three times that amount. If, therefore, such enactments are to be understood as indicating that it is deemed unwise to allow corporations to incur liabilities beyond a prescribed limit, it must be admitted that the sentiment is by no means harmonious as to where the limit should be placed. These statutes do not therefore indicate, as contended by counsel for appellees, that legislatures have considered it bad management in the affairs of a corporation to contract debts beyond

the amount of its capital stock. Section 16 of our statute does not prohibit the contracting of indebtedness in excess of capital stock, neither does it, in terms, inflict a penalty for so doing. Therefore a prohibition cannot be implied, and to say, as counsel insist should be done, that the assenting is made unlawful by the infliction of a penalty, is to assume the very question controverted.

While it is true that statutes of other states making officers of corporations individually liable for contracting debts beyond a prescribed limit have been held to be penal, the language of those statutes will be found materially different from ours, and, so far as we have been able to ascertain, expressly prohibit the incurring of liabilities beyond certain limits fixed In *Horner* v. *Henning*, 93 U. S. 228, the supreme court of the United States, in passing upon an act of Congress regulating corporations in the District of Columbia, the language of which is almost identical with that of our statute, it was held that the act was not penal, for reasons which we think unanswerable. We followed that decision in *Low* v. *Buchanan*, 94 Ill. 76, in holding that the liability created by section 16 could only be enforced in chancery, and this is, in effect, deciding that the action is not for the recovery of a penalty. "It is a universal rule in equity, never to enforce either a penalty or a forfeiture": 2 Story's Eq. Jur., sec. 1319; *Queenan* v. *Palmer*, 117 Ill. 619.

In 2 Morawetz on Corporations, section 908, it is said: "It is not always quite clear what the courts mean to express by saying that statutes of this character are penal, and that they impose upon the directors a penal liability. The liability of directors under such a statute is undoubtedly not the result of a contract between the directors and the creditors of the corporation; but that is evidently not what the courts mean to express. The liability of directors to creditors for a tort, or a misapplication of corporate funds, or a breach of trust, does not arise out of contract; yet the courts would certainly not call this a penal liability, or refuse to enforce it because it arose under the laws of a foreign state. Nor is the liability of the directors under these statutes penal, in the sense in which the word "penal" is used in criminal law. It is not a penalty or fine imposed by the state for the infraction of public law. The liability of the directors is, both in form and substance, a private obligation, similar, in many respects, to that of sureties. It is imposed by the legislature partly for

the purpose of inducing the directors to do their prescribed duties, and partly for the purpose of securing the company's creditors from losses caused by those who have control over the company's funds. The statutes imposing this liability establish a new rule of private right, — a rule which, although unknown to the common law, may be founded on sound principles of justice and expediency."

In *Neal* v. *Briggs*, 12 Ga. 104, it is directly held that a provision in the charter of a corporation prohibiting the contracting of debts in excess of three times the amount of the capital stock paid in is not penal, within the statute of that state limiting the bringing of penal actions to a period of six months.

We are clearly of the opinion that this suit cannot be held to be a suit for the recovery of a penalty, within the meaning of section 14 of our statute of limitations.

This view does not conflict with that expressed by the appellate court for the first district, but it was there held that although the statute is not penal, still the cause of action authorized by it accrues immediately upon the officers assenting to the excessive indebtedness; and hence, in this case, the five years' bar was complete when the bill was filed. In this view we do not concur. We are unable to perceive upon what legal principle it can be maintained that the liability of appellees, though not penal, accrued at the date of the execution of the notes in suit. The object of such statutes, says Thompson, in his work on the liability of officers and agents of corporations (sec. 20, p. 456), "is to afford creditors of corporations better security for their debts." And again, in section 23, he says: "By the analogy of cases which relate to the liability of share-holders who are not directors, it would seem clear, in the absence of anything in the statutes importing the contrary, that a creditor could not proceed against the officers of a corporation without first having obtained a judgment against the corporation. This would seem to be true for stronger reasons than in the case of stockholders, for the liability of the directors is, like that of a surety, *stricti juris*, and, obviously, ought not to attach so long as the debt can be made out of the company. And so it has been held under a statute charging the directors of an insurance company with liability for losses on policies issued after the company was under a liability to an amount equal to its capital stock." See also 1 Morawetz on Private Corporations, sec. 908.

Even in cases holding such enactments penal in their

nature, the fund arising therefrom is not treated as a penalty, but rather as a fund for the indemnity of all creditors, the measure of recovery being limited by the excess assented to: *Sturges* v. *Burton*, 8 Ohio St. 215; 72 Am. Dec. 587. In *Horner* v. *Henning*, 93 U. S. 228, it is said: "But it is not readily to be believed that Congress intended to make the trustees liable beyond the debts of the bank which it failed or refused to pay; yet if the excess is a penalty it would be no defense for the directors to plead that the bank was ready and willing, and had never refused, to pay when demand was made. In fact, while the bank, outside of its capital stock, may have had one million dollars in its vaults ready to pay, a single creditor who had never demanded his money of the bank could sue the trustees." The act is also spoken of in that opinion as being "for the benefit of the creditors generally, when the bank proves insolvent." And again, it is said in the same case: "We are of opinion that the fair and reasonable construction of the act is, that the trustees who assent to an increase of the indebtedness of the corporation beyond its capital stock are to be held guilty of a violation of their trust; that Congress intended that so far as this excess of indebtedness over capital stock was necessary, they should make good the debts of the creditors who had been the sufferers by their breach of trust; that this liability constitutes a fund for the benefit of all the creditors who are entitled to share in it, in proportion to the amount of their debts, so far as may be necessary to pay these debts. The remedy for this violation of duty as trustees is, in its nature, appropriate to a court of chancery. The powers and instrumentalities of that court enable it to ascertain the excess of the indebtedness over the capital stock, the amount of this which each trustee may have assented to, and the extent to which the funds of the corporation may be resorted to for the payment of the debts; also, the number and names of the creditors, the amount of their several debts, to determine the sum to be recovered of the trustees, and apportioned among the creditors in a manner which the trial by jury and the rigid rules of common-law proceedings render impossible."

In *Low* v. *Buchanan*, 94 Ill. 76, we said: "After a careful consideration of the matter, we have reached the conclusion that directors and officers of stock corporations who incur liabilities under the section in question become bound and answerable, not to some particular creditor, but, in the language of

the act, to the creditors, — that is, all the creditors. This construction puts all the creditors upon a perfect equality, and is in conformity with the express words of the act. It was doubtless the object and purpose of the legislature that all claims arising under the provisions of the section in question should be regarded in the nature of a trust fund, to be collected and divided *pro rata* among all the creditors. And if we are correct in this conclusion, it is quite manifest that this distribution of the fund could only be made in a court of equity." We also there held that all that had been said in *Horner* v. *Henning*, 93 U. S. 228, as to the appropriateness of a chancery proceeding under the act of Congress, applied with equal force to our statute.

We think it clear that the liability of corporation officers under section 16, *supra*, is not an absolute liability, but is only to be enforced to the extent that the corporation fails to pay its creditors; that the liability is in the nature of security to all the creditors of the corporation. If this conclusion is correct, the citation of authorities is unnecessary to show that no action can be maintained against the officers until the corporation is in default. For aught that appears in this bill, George H. Taylor & Co., at the time these notes were given, had assets representing not only its fifty thousand dollars capital stock, but the full amount of its excessive indebtedness; in other words, was perfectly solvent, ready and willing to pay all its debts as they matured. Suppose the payees of these notes had then filed a bill against appellees to enforce payment; would it be pretended, in the light of *Horner* v. *Henning*, 93 U. S. 228, that it could have been maintained? Could not the defendants have answered that the corporation was solvent, "ready and willing, and had never refused, to pay when demand was made"?

It is said, however, that if the cause of action does not accrue until the maturity of the debt, a bill cannot be maintained until all the debts of the corporation are due, because the liability is for the benefit of all creditors, and must be enforced by a single bill; and therefore, it is argued, the remedy becomes impracticable, or may be so rendered by the officers contracting debts to mature at a remote period in the future. It does not follow that because the creditor who files the bill must allege and prove the corporation in default as to his debt, that he cannot maintain the bill until all debts against the corporation are due. On the allegations of the bill in ques-

tion, there can be no doubt as to the power of a court of chancery to bring before it the corporation, all its officers who had assented to excessive indebtedness, as well as all its creditors, and, in the language of Justice Miller, which we have said is equally applicable to our statute, "ascertain the excess of the indebtedness over the capital stock, the amount of this which each trustee may have assented to, and the extent to which the funds of the corporation may be resorted to for the payment of debts; also, the number and the names of the creditors, the amount of their several debts, to determine the sum to be recovered of the trustees and apportioned among the creditors."

But if the difficulties supposed to exist under the construction that the right of action accrues only on the maturity of the indebtedness were real, they could not be avoided by holding that it accrues at the date of the contract. The statute certainly does not mean that the officers shall only become liable for one act of assenting to excessive indebtedness during the life of the corporation. The amount in excess may continue to be increased from time to time by different officers, running over a period of years. By a single bill, for the benefit of all the creditors, against all these officers, that excess may be recovered and made a fund for the payment of all the debts. From what date would the statute of limitations begin to run in such a case? The officers, if liable at all, are liable to all the creditors of the corporation, — those existing prior to the contract creating the excessive indebtedness, those whose debts are created thereby, and also those who may afterwards become its creditors. As to the subsequent creditors, could it be said the cause of action accrued before they became creditors? The action must be for their benefit, as well as that of all others, and yet they may not have become creditors of the corporation until more than five years after the first assenting to excessive indebtedness.

The statute not being penal, but intended to afford additional security to creditors, it should be so construed as to effectuate that purpose without imposing punishment upon the officers or hardship upon the creditors. To hold that the officers may be sued the moment they assent to the excessive indebtedness would operate by way of punishment, by compelling them to pay debts long before they became due. On the other hand, that construction would operate harshly on creditors. They have not the means of knowing that the in-

debtedness of a corporation has been allowed to exceed its capital stock, and may in good faith give credit to a perfectly solvent and even wealthy corporation for a term of years. By all reasonable rules of business they cannot be required to look to the collection of their debts until they are due; and yet, under the rule contended for, should they find it necessary to resort to this statutory liability of officers, they may be confronted with the statute of limitations, and told that its bar became complete long before the maturity of the debt sought to be recovered.

We hold that the cause of action set forth in this bill did not accrue until the maturity of the notes therein described; that the action is not for the recovery of a penalty; and five years between the date of the maturity of the first of said notes to fall due and the filing of the bill not having intervened, the action was not barred. The demurrer to the bill should therefore have been overruled.

Judgment reversed.

CORPORATIONS — DIRECTOR'S LIABILITY TO CREDITOR. — Where the statute gives a creditor a right of action against the directors of an insolvent corporation, he need not establish his claim against the corporation by judgment before bringing his suit: *Patterson* v. *Stewart*, 41 Minn. 84; 16 Am. St. Rep. 671. Compare *Barrick* v. *Gifford*, 47 Ohio St. 180; 21 Am. St. Rep. 798. Directors are liable personally for such specific debts as are contracted with their assent in excess of the paid-up capital, and remain unpaid after the corporation assets are exhausted, where the charter forbids them to contract such indebtedness: *Allison* v. *Coal Co.*, 87 Tenn. 60. To render the directors of a corporation individually liable under the California code for a debt created beyond the subscribed capital stock, it must appear that the corporation must have been indebted at the time in an aggregate amount exceeding the amount of its capital stock: *Moore* v. *Lent*, 81 Cal. 502.

EQUITY — FORFEITURES AND PENALTIES. — As to relief in courts of equity against forfeitures and penalties, see *Smith* v. *Mariner*, 5 Wis. 551; 68 Am. Dec. 73, and particularly note 85–88. Equity is slow to enforce a forfeiture under any circumstances: *Shade* v. *Oldroyd*, 39 Kan. 313.

LIMITATIONS OF ACTIONS — WHEN THE STATUTE BEGINS TO RUN. — The statute of limitations begins to run only when the cause of action accrues: Note to *Kessinger* v. *Wilson*, *ante*, p. 228; *O'Hara* v. *State*, 112 N. Y. 146; 8 Am. St. Rep. 726.

KIRKPATRICK v. CLARK.

[122 ILLINOIS, 342.]

LEGAL TITLE TO LAND CANNOT BE PROVED BY PAROL EVIDENCE in an action of ejectment.

EQUITABLE TITLE CANNOT BE SHOWN IN DEFENSE IN EJECTMENT. — Only legal titles can be investigated in an action of ejectment, and the equitable title of the defendant cannot be shown in defense.

TRUSTEE MAY RECOVER IN EJECTMENT LANDS AFFECTED BY THE TRUST, even as against the *cestui que trust*.

HUSBAND NOT DEFRAUDED BY WIFE'S PURCHASING LAND SO AS TO PREVENT HIS RIGHT OF DOWER FROM ATTACHING. — It is no fraud upon a husband for his wife, in purchasing lands with her own separate means, or with means derived from sources other than her husband, to have the title conveyed to a trustee for the express purpose of preventing his right of dower from attaching thereto.

PARTIES IN PARI DELICTO LEFT WITHOUT REMEDY AGAINST EACH OTHER. — The law leaves without remedy against each other parties concerned in illegal agreements, provided they are *in pari delicto*. And this rule is applied to executed transactions as well as to those that are executory, and is enforced by courts of law as well as by courts of equity. Where, therefore, a fraudulent transaction has been consummated between the parties to an action of ejectment to the extent of vesting the title to the land in the plaintiff, and leaving the possession in the defendant, the law will leave them as they are, and will not permit the plaintiff to recover the possession.

EJECTMENT. The opinion states the case.

Morrison and Whitlock, for the appellant.

Edward L. McDonald, for the appellee.

BAILEY, J. This was an action of ejectment, brought by Frank H. Clark against Susie Kirkpatrick, to recover lot 27, in Tilton and Cassell's addition to Jacksonville. A trial was had on a plea of not guilty, resulting in a verdict and judgment in favor of the plaintiff, and the defendant now appeals to this court.

The plaintiff, at the trial, made proof, under the twenty-fifth section of the statute in relation to ejectment, that he claimed title through one Matthew Ashelby, a common source of title with the defendant, and then read in evidence a warranty deed from said Ashelby and wife, duly acknowledged and recorded, conveying said lot to him. The defendant's counsel then called the defendant as a witness in her own behalf, and after she had testified that she had been acquainted with the plaintiff for about eleven years, and that when she first became acquainted with the lot in question it was the property of Mr. Ashelby, she was asked the following questions: "State

whether or not, at the time this deed was made to Mr. Clark, you were in a controversy with your husband, and whether or not the deed was made to Mr. Clark by arrangement between you and Mr. Clark, so as to prevent any claim your husband might have on the property if the deed was in you. You may state whether or not Mr. Clark at any time in fact was the owner of and in possession of that property."

These questions, being both objected to by the plaintiff's counsel on the ground of incompetency and immateriality, were excluded, and thereupon the defendant's counsel made to the court the following statement and offer: "We expect and offer to prove by this witness and two other witnesses, Mr. and Mrs. Rogers, who have been sworn and are now in court, that they heard a conversation between Mr. Clark and Mrs. Kirkpatrick, in which it was stated that Mr. Clark had no interest in the property, and never had any; that the deed was made to him for the purpose of hindering and defrauding creditors and the husband of Mrs. Kirkpatrick, and that Mr. Clark then admitted that every cent that Mrs. Kirkpatrick ever owed him had been paid, and that he had no claim to the property, — no right to it, — and that the property in controversy in this case was held by him only for the purpose of hindering and delaying creditors; that she asked him to give her a deed to the property, and he refused to do it, but admitted that he had no title to it, and that he only held it to cover it up so that the creditors could not get it, and also to prevent her husband from having any right to it."

The evidence thus offered, being objected to as incompetent, was excluded, and counsel then further offered to prove by Mrs. Kirkpatrick "that she went in company with Mr. Clark to Mr. Ashelby, and requested Mr. Ashelby to make the deed to Mr. Clark for the property, but did not tell Mr. Ashelby the reason for its being made to Mr. Clark; that Mrs. Kirkpatrick paid in full the consideration of said deed." This evidence also, being objected to for the same reason, was excluded. Exceptions were duly preserved by the defendant to the rulings of the court excluding said evidence, and said rulings are the only errors now assigned upon the record.

A considerable portion of the evidence offered was clearly incompetent or immaterial, or both. Thus the question put to the witness as to whether the plaintiff had ever been in fact the owner of the property in question, if understood as calling for the legal ownership of the lot, was incompetent, as the

legal title to lands cannot be proved in that mode. If understood as calling for the equitable title, it was immaterial, as in this form of action only legal titles can be investigated.

So of the question whether the deed was not made to the plaintiff by arrangement between him and the defendant, with a view to keeping said lot free from any claim the defendant's husband might have thereon in case the title was taken in her name. The evidence called for by that question would simply have tended to show that the plaintiff took and was holding the title to said lot as trustee for the defendant. Her equitable title thus attempted to be shown was quite immaterial, since it constituted no defense to the action. The rule is well settled that a trustee may recover in ejectment the lands affected by the trust, even as against the *cestui que trust*. In *Reece* v. *Allen*, 5 Gilm. 236, 48 Am. Dec. 336, this court said: "A court of law may indeed investigate some questions of fraud, and, when proved, treat a deed as a nullity, and conveying no title, as where a party was induced to execute a deed, supposing it was another paper, but in general it will not go behind the naked legal title, and inquire where the equities are. Even in case of a naked trustee, the law is so strenuous for the legal title that it enables the trustee to recover in ejectment against the *cestui que trust*." See also *Kirkland* v. *Cox*, 94 Ill. 400; Sedgwick and Wait on Trial of Title to Land, sec. 222, and cases cited in notes.

If it be said that the purpose of said question was to elicit evidence tending to show that said conveyance to the plaintiff was a fraud upon the rights of the defendant's husband, it may be answered that, even admitting that proof of such fraud would have been material, said evidence would have had no tendency to prove it. If the lot in question had been conveyed directly to the defendant, it would have vested in her husband no right or interest except an inchoate right of dower, and it was no fraud upon him if his wife, in purchasing the lot, had the title conveyed to a trustee for the express purpose of preventing such right from attaching. Even at common law, where the husband was entitled to the possession and enjoyment of his wife's lands during their joint lives, it was never supposed to be a fraud upon his rights for his wife to have lands purchased with her separate means, or derived from sources other than her husband, conveyed to a trustee, for the sole purpose of placing them beyond his control, and having them held for her separate use; and such trusts were habitu-

ally resorted to for that purpose. But under our statute a married woman is entitled to the sole possession and enjoyment of her lands, free from the interference and control of her husband, the husband's right of dower, even after it has become vested, being imperfect and incapable of assertion or beneficial enjoyment until after her death. How, then, can he be said to have rights in lands which his wife does not yet own, but which she contemplates purchasing, which it would be a fraud upon him to deprive him of? Dower in lands which the wife does not yet own is an interest to which the husband has neither a legal, equitable, or moral right, and the wife is entirely at liberty to so manage her purchases made with her own means, if she can, as to prevent his acquiring such right.

A more difficult question is raised by that portion of the offer of the defendant's counsel in which they proposed to prove by said witnesses that the lot in question was paid for by the defendant, but that by arrangement between her and the plaintiff the conveyance was made by Ashelby to the plaintiff with intent to hinder and defraud the defendant's creditors, such intention being participated in by both the plaintiff and defendant. It is a general rule, subject, it is true, to certain exceptions, that where parties are concerned in illegal agreements, they are left without remedy against each other, provided they are *in pari delicto*. The law in such cases refuses to lend its aid to either party, but leaves them where it finds them, to suffer the consequences of their illegal or immoral acts. This rule is ordinarily expressed by the maxim, *Ex dolo malo* or *ex turpi causa, non oritur actio*, or by the maxim, *In pari delicto potior est conditio defendentis et possidentis*. These maxims are applied to executed transactions as well as to those which are executory, and are enforced by courts of law as well as courts of equity. As said by the chancellor in *Bolt* v. *Rogers*, 3 Paige, 154: "Wherever two or more persons are engaged in a fraudulent transaction to injure another, neither law or equity will interfere to relieve either of those persons, as against the other, from the consequences of their own misconduct." In *Smith* v. *Hubbs*, 10 Me. 71, the court say: "There is a marked and settled distinction between executed and executory contracts of a fraudulent or illegal character. Whatever the parties to an action have executed for fraudulent or illegal purposes, the law refuses to lend its aid to enable either party to disturb. What-

ever the parties have fraudulently or illegally contracted to execute, the law refuses to compel the contractor to execute, or pay damages for not executing, but in both cases leaves the parties where it finds them. The object of the law in the latter case is, as far as possible, to prevent the contemplated wrong; and in the former, to punish the wrong-doer, by leaving him to the consequences of his own folly or misconduct." See also *Miller* v. *Marckle*, 21 Ill. 152; *Nellis* v. *Clark*, 20 Wend. 24; *Howell* v. *Fountain*, 3 Ga. 176; 46 Am. Dec. 415; *Carey* v. *Smith*, 11 Ga. 539; *White* v. *Crew*, 16 Ga. 416; 1 Story's Eq. Jur., sec. 298.

If it be true, as the evidence offered would tend to show, that the defendant purchased the lot in question of Ashelby with her own money, but, for the purpose of hindering and defrauding her creditors, entered into a fraudulent arrangement or conspiracy with the plaintiff to have said lot conveyed to him, said transaction was illegal, and within the condemnation of the fourth section of our present statute of frauds. The transaction being consummated by the execution of the conveyance to the plaintiff, leaving the defendant in the possession which she had previously obtained under a demise from Ashelby, the law should leave them both where it finds them. The defendant clearly could not be permitted to go into a court of equity to compel an execution by the plaintiff of his trust, and it would seem that, upon the same principle, the plaintiff should be debarred from coming into a court of law to use his ill-gotten title for the purpose of recovering of the defendant the possession.

We know of no case where this precise question has been decided by this court, but cases are to be found where the reasoning adopted has a tendency to support the view above expressed. The case of *Rogers* v. *Brent*, 5 Gilm. 573, 50 Am. Dec. 422, was ejectment, brought by the holder of a patent from the United States, issued to him as assignee of the certificate of entry, against the holder of a title derived through a sheriff's deed executed upon a sale of the land on execution against the original holder of said certificate prior to its assignment to the plaintiff. The court, in holding that the assignment of the certificate and the patent subsequently issued thereon were fraudulent and void as to the defendant, said: "The law is, that the common-law courts may entertain jurisdiction of questions of fraud, and that a conveyance, whether it be by deed from an individual or by a patent

from the government, although executed with all the forms of the law, when obtained in fraud of the rights of others, may, in an action of ejectment, be disregarded by the court as void at the instance of the injured party or those holding under him." In the course of the opinion it is said, by way of argument, that "it would hardly have been denied that a court of law would treat as a nullity a deed to the assignee, when it was established that the assignment was made and the deed obtained to defraud creditors, or to defeat a title previously obtained by a sale under an execution against the assignor."

In *Jamison* v. *Beaubien*, 3 Scam. 113, 36 Am. Dec. 534, which was also an action of ejectment, the plaintiff's proof of title consisted of a certificate of pre-emption, and certain evidence tending to impeach the pre-emption on the ground of fraud being excluded by the trial court, this court, in holding that such exclusion was erroneous, said: "Fraud, it is said, vitiates all acts as between the parties to it; nor can there be a doubt that fraud is cognizable in a court of law, as well as equity. It is an admitted principle that a court of law has concurrent jurisdiction with a court of equity in cases of fraud. The evidence offered went directly to the validity of the certificate of pre-emption purchase. If it had its inception in fraud, it was certainly competent for the defendant to show the fact; and if the officers granting it were parties to the fraudulent act, it was no doubt void, and might be impeached in an inquiry in which the pre-emptor was a party."

The case of *Miller* v. *Marckle*, 21 Ill. 152, was a bill in equity for the foreclosure of a mortgage, alleged by the mortgagor to have been executed without consideration, for the purpose of securing his property against his creditors until he could get means to settle with them, and this court, in holding that the defense should have been sustained, said: "If money has been actually paid, or property transferred, and the grantee put in possession, courts will not compel the money or property to be restored, or the party ousted. They will not, on the one hand, undo what has been done, nor on the other, perfect what has been left unfinished. Suppose the position of these parties reversed, and the appellant was seeking, by bill in chancery, to rescind the mortgage, and for a surrender of the notes. The court would not interfere; it would leave the parties where it found them, aiding neither.

We would say, You executed the notes and the mortgage for a fraudulent purpose; the act is binding on you, and you cannot have our aid to compel their surrender. So we say to the appellee here, You have the notes and mortgage; you were a willing party to the proposed fraud; equity aids no iniquity. Had an absolute deed of the premises been made, and the party put in possession, the court would not interfere to oust him." See also *Tyler* v. *Tyler*, 126 Ill. 525; 9 Am. St. Rep. 642.

In the first two of the three cases last above cited, the fraud was set up by parties not *in pari delicto* with the parties against whom the fraud was charged. Those cases sustain the rule, however, that a court of law will, in an action of ejectment, on proper proof, hold a conveyance upon which a party relies to establish his title to be fraudulent and void, at least where the fraud is charged by one who is not a party to it. In the case last cited, the court held that it was proper to grant relief at the instance of a participant in the fraud.

In the present case, if the facts are as the evidence offered would tend to show, the fraudulent transaction has been consummated to the extent of vesting the title in the plaintiff, and leaving the possession in the defendant. Here, according to the rules of law above discussed, they should be left. The defendant, clearly, can have no remedy to recover the title, and if the plaintiff is permitted in this action to recover the possession, said rules will be applied in all their vigor to the defendant, while the plaintiff will be exempted from their application. His present title, without the possession or the means of obtaining it, is a barren right. But if a court of law can lend him its aid to recover the possession, his title becomes perfect, at least as against the defendant, and the law, notwithstanding his participation in the fraud, will be to him both a sword and a shield. We are not inclined to so apply the law as to involve an absurdity of this character.

In *Harrison* v. *Hatcher*, 44 Ga. 638, the precise question before us was presented, and we are disposed to concur with the conclusion reached by the court in that case. The action was ejectment, and the plaintiff claimed title under a deed executed to him by the defendant, and the evidence tended to show that said deed was executed by the defendant without consideration and for the purpose of defrauding the grantor's creditors. The defendant asked the court to charge the jury, among other things, in substance, that if said deed was exe-

cuted by him to defraud his creditors, and that he remained in possession, the transaction was fraudulent, and the defendant could not be ousted of possession, as the court would not aid a party to a fraud to assert rights against the other party, and would not disturb the possession. This charge the court refused to give, and there being a verdict and judgment for the plaintiff, it was held, on appeal, that the refusal of the court to charge as requested was error. The point thus raised is discussed in its opinion, as follows: "On looking into the cases upon this subject, we are satisfied that the rule, *In pari delicto*, applies to the condition of a defendant in a suit, even though he sets up his own fraud. He is in possession, and the courts will not aid the other party to get possession under a fraudulent deed. They will even permit the defendant to say the deed under which the plaintiff claims is a fraud, — the result of evil practice between him and me; and if this be made out by the proof, the plaintiff cannot recover."

It follows that in the present case the evidence offered, so far as it tended to show that the deed under which the plaintiff claims title was executed in fraud of the defendant's creditors, was proper, and should have been admitted, and that its exclusion was error. For said error, the judgment will be reversed, and the cause remanded.

EJECTMENT — EQUITABLE DEFENSES. — An equitable title cannot be set up as a defense in an action of ejectment: *Shaw* v. *Hill*, 83 Mich. 322; 21 Am. St. Rep. 607, and note; *Gates* v. *Sutherland*, 76 Mich. 231; *Johnson* v. *Pontious*, 118 Ind. 270; *Geiges* v. *Greiner*, 68 Mich. 153; *Williams* v. *Peters*, 72 Md. 584; but in California, Missouri, and Oregon, by statutory provisions, the rule is different: *Hyde* v. *Mangan*, 88 Cal. 319; *St. Louis* v. *Schulenburg etc. Co.*, 98 Mo. 613; *Spaur* v. *McBee*, 19 Or. 76. In *McGinnis* v. *Fernandes*, 126 Ill. 228, it was decided that a defendant in ejectment, seeking to show that the plaintiff's deed was in fact only a mortgage, must proceed in equity to enjoin the action at law, and show the true character of the deed. Where defendant sets up title in himself under a resulting trust, against the legal title of plaintiff, the action becomes a proceeding in equity: *Wylie* v. *Manley*, 132 Pa. St. 65; *Martin* v. *Fix*, 44 Kan. 540. One in possession under an unperformed contract of purchase from the beneficiary in the first deed of trust may defend in an action of ejectment by the beneficiary in the second deed of trust: *Collins* v. *Stocking*, 98 Mo. 290.

EJECTMENT — PROOF OF PLAINTIFF'S TITLE. — Where plaintiff's petition does not set up any particular evidence of title in himself, he may prove his title by any method he chooses, allowed by law: *Davidson* v. *Gifford*, 100 N. C. 18.

EJECTMENT — PARTIES PLAINTIFF. — As to when the trustee is the proper party plaintiff in an action of ejectment, and when the *cestui que trust* must sue as plaintiff, see note to *Doggett* v. *Hart*, 58 Am. Dec. 472–475.

PARTIES IN PARI DELICTO — REMEDY. — When the parties are *in pari delicto*, the law will refuse relief to either: *Hess* v. *Culver*, 77 Mich. 598; 18 Am. St. Rep. 421, and note; *Freeman* v. *Sedgwick*, 6 Gill, 28; 46 Am. Dec. 651, and note; *Smith* v. *Wimsatt*, 84 Va. 840; *Parrott* v. *Baker*, 82 Ga. 365; *Shattuck* v. *Watson*, 53 Ark. 147; *Shipley* v. *Reasoner*, 80 Iowa, 548; *Duval* v. *Wellman*, 124 N. Y. 156; *Walfley* v. *Shenandoah*, 83 Va. 768.

ROODHOUSE *v.* ROODHOUSE.

[132 ILLINOIS, 260.]

GUARDIAN CANNOT ACT FOR HIS WARD IN PARTITION WHEN. — A guardian whose interest is hostile to that of his ward is incompetent to act for his ward in respect to that interest. Where, therefore, a guardian and his ward are tenants in common of land, it is error to decree a partition between them in a suit brought in the names of the guardian and the infant by such guardian. In such a case, the minor should either be made defendant and have a guardian *ad litem*, or should petition by his next friend or guardian *ad litem* and be represented by counsel distinct from those representing his guardian. A statute providing that an infant may, by his guardian or next friend, petition for partition of lands means when such guardian or next friend is competent to act in the case.

WRIT of error. The opinion states the case.

James R. Ward and T. S. Chapman, for the plaintiff in error.

Mark Meyerstein, for the defendants in error.

SCHOLFIELD, J. This is a writ of error to bring in review a decree of the circuit court of Greene County, assigning dower in and making partition of lands whereof Peter Roodhouse died seised. The bill is filed by Harry W. Roodhouse and Benjamin T. Roodhouse, a minor, by Harry W. Roodhouse, his guardian, and prays the assignment of dower to the widow of Peter Roodhouse, deceased, and that the lands remaining be partitioned between the petitioners, his sole heirs at law. Commissioners were appointed, who assigned dower and made partition as prayed, and they reported their action to the court, and it was confirmed.

The only question that we think it necessary to consider is, whether it was error to partition the lands without having the minor represented by a guardian *ad litem* or a next friend. It is plain that the interests of the ward and the guardian were hostile, since what was given to the one was taken from the other. We have held that it is error to render a decree for

partition of the property of a minor, unless he is actually represented in court, either by a guardian, a guardian *ad litem*, or a next friend: *Cost* v. *Rose*, 17 Ill. 276; *McDaniel* v. *Correll*, 19 Ill. 226; 68 Am. Dec. 587; *Rhoads* v. *Rhoads*, 43 Ill. 239; *Hall* v. *Davis*, 44 Ill. 494. Our statute, it is true, provides that an infant may petition, by guardian or next friend, for partition of lands: Rev. Stats. 1874, c. 106, sec. 3; but, upon the clearest principle, this means when such guardian or next friend is competent to act in the case; and a guardian whose interest is hostile to that of his ward is incompetent to act for his ward in respect to that interest: *Simpson* v. *Alexander*, 6 Cold. 619; *Parker* v. *Lincoln*, 12 Mass. 16; *Winston* v. *McLendon*, 43 Miss. 254; *Wells* v. *Smith*, 44 Miss. 296. The minor should either have been made defendant and had a guardian *ad litem*, or have petitioned by his next friend or guardian *ad litem* and been represented by counsel distinct from those representing his guardian.

For the error indicated, the decree is reversed, and the cause remanded for further proceedings.

GUARDIAN AND WARD. — Where the private interests of guardian and ward are conflicting, a guardian is incapacitated from representing his ward in that business: *Paxton* v. *Gamewell*, 82 Va. 706; *Hopphead* v. *State*, 120 Ind. 327; nor will a court of equity aid a guardian who allows his claims to come into conflict with those of his ward: *Lee* v. *Stuart*, 2 Leigh, 76; 21 Am. Dec. 599.

EMMONS *v.* CITY OF LEWISTOWN.

[132 ILLINOIS, 380.]

"HAWKERS" AND "PEDDLERS" DEFINED. — A "hawker" is a person who carries about merchandise from place to place for sale, as opposed to one who sells at an established shop. A "peddler" is a person who goes about from house to house selling commodities.

BOOK-CANVASSER IS NOT HAWKER OR PEDDLER. — A person who canvasses from house to house, taking orders for the future delivery of books and periodicals or other publications, is neither a hawker nor a peddler, within the meaning of the Illinois statute authorizing municipal corporations to license, regulate, or prohibit hawkers and peddlers. And therefore a city council has no power to pass an ordinance prohibiting such canvassing within the city without first obtaining a license, or imposing a penalty therefor.

THE opinion states the case.

H. W. McMasters, for the appellant.

Gray and Waggoner, for the appellee.

SHOPE, C. J. The appellant, a resident of Logan County, in this state, was engaged in the city of Lewistown in canvassing and taking orders for the sale of religious books and Bibles published by the Historical Publishing Company of St. Louis, Missouri, — the books so ordered to be paid for when delivered, — and while so engaged as agent of such company, appellant was arrested and brought before a magistrate, and tried upon the charge of violating ordinance No. 45 of said city. That ordinance provides: "Any person or persons, or corporation, who shall, within the limits of said city, without first procuring a license therefor, exercise or carry on, either directly or indirectly, the trade, business, occupation, or employment of auctioneers, peddlers, hawkers, canvassers of books, maps, or other publications, canvassers, vendors, or solicitors of or for any medicine, invention, or other articles of merchandise to be sold, or taking orders therefor, on the streets or from house to house, or who shall set up, manage, give, hold, or conduct a circus exhibition, menagerie, equestrian performance, musical or minstrel party, or concert, theatrical, or ballet troupes and combinations, exhibitions of wire-dancing, puppets, wax figures, paintings, statuary, machinery, tricks of legerdemain, magic-lantern exhibitions, skating-rink, or any other exhibition, show, or amusement for gain or profit, or where pay for admittance is required, shall, on conviction thereof, forfeit and pay, for the use of said city, not less than ten dollars nor more than two hundred dollars for each offense; provided, the fine shall not in any case be less than would have been required for a license; and provided also, that no license shall be required for the sale of articles that are exempt from license by the statutes of the state of Illinois, or for orders and sales at wholesale by drummers."

It was admitted on the trial that appellant, at the time of his arrest, was soliciting and taking orders for books issued or published by his principal, on the streets and from house to house, within the limits of said city, and without having procured a license therefor from the city authorities. The trial resulted in the imposition of a fine and costs. On appeal to the circuit court of Fulton County the cause was retried, resulting in a judgment against appellant for ten dollars and costs. From this judgment, appellant has prosecuted his appeal to this court.

It is here insisted that as the defendant below was the agent

of a publishing house located in the state of Missouri, and, in the acts complained of as being in violation of said ordinance, was engaged in the business of his non-resident principal, the ordinance, when applied to him, interfered with the reserved powers given by the third clause of the eighth section of the first article of the constitution of the United States to Congress to regulate commerce "among the several states." Reliance is placed upon the case of *Robbins* v. *Shelby Taxing District*, 120 U. S. 489, as sustaining that contention, and if the ordinance is otherwise valid, it must be conceded that that question is involved. We do not deem it necessary, however, to discuss or determine this question, for the reason that the ordinance must be held invalid, as applied to the class of offenses with which the appellant was charged, upon other, and to us more satisfactory, grounds.

It is shown that appellant was canvassing from house to house within the city, soliciting subscriptions to certain publications, taking orders therefor, to be paid upon the subsequent delivery thereof. It is not shown that he was carrying such publications, and proposing to sell and deliver the same, or any other goods, wares, or merchandise, within said city. That he fell within the prohibition of the ordinance is not questioned. The city of Lewistown is incorporated under the city and village act, and the authority to pass this ordinance must be found, if at all, in paragraph 41 of section 36 of chapter 24 of the Revised Statutes, which gives the power to the city council, and the president and board of trustees in villages, "to license, tax, regulate, suppress, and prohibit hawkers, peddlers, pawn-brokers, keepers of ordinaries, theatricals, and other exhibitions, shows, and amusements, and to revoke such license at pleasure." By a subsequent paragraph of the same section the city council is given power to pass all ordinances, and to make all such rules and regulations as are proper and necessary to carry into effect the powers granted, and to impose penalties. The power given is to license, tax, regulate, suppress, and prohibit "hawkers" and "peddlers," etc., and if it shall be found that "canvassers of books or other publications, ... on the streets or from house to house," are not hawkers or peddlers, within the meaning of these words as used in the statute, then it is clear that the city council was without authority to pass an ordinance prohibiting such canvassing within the city without first obtaining a license, or imposing a penalty therefor.

It is to be observed that neither the ordinance nor the statute attempts to define who shall be deemed "hawkers" or "peddlers," and we are therefore to determine from authority whether appellant falls within these designations.

We said in *City of Chicago* v. *Bartee*, 100 Ill. 61, that the term "peddler," as used in this statute, was to be taken in its general and unrestricted sense, and embraced all persons engaged in going through the city from house to house and selling commodities, — in that case, selling milk. Abbott's Law Dictionary defines a "hawker" to be: "A person who practices carrying merchandise about from place to place for sale, as opposed to one who sells at an established shop. It is equivalent to peddler, the term now more commonly employed." The same author quotes from the case of *Commonwealth* v. *Ober*, 12 Cush. 493, as follows: "It is not, perhaps, essential to the idea, but it is generally understood from the word, that a hawker is one who not only carries goods for sale, but seeks for purchasers, either by outcry (which some lexicographers concede as intimated by the derivation of the word) or by attracting notice and attention to them as goods for sale by an actual exhibition or exposure of them by placards or labels, or by a conventional signal, like the sound of a horn in the sale of fish." Tomlin says: "Hawkers, peddlers, and petty chapmen" are "persons traveling from town to town with goods and merchandise." Bouvier defines peddlers: "Peddlers, — persons who travel about the country with merchandise for the purpose of selling." Webster's definition is: "A traveling trader; one who carries small commodities about on his back, or in a cart or wagon, and sells them."

This list of definitions might be extended almost indefinitely, but enough has been given to show both the legal and popular meaning of the words "hawker" and "peddler." It has never been understood, either by the profession or the people, that one who is ordinarily styled a "drummer" — that is, one who sells to retail dealers or others by sample — is either a hawker or a peddler; and the same is true in respect of persons who canvass, taking orders for the future delivery of books and periodicals or other publications. It is a fundamental canon of construction that the legislature must be presumed to have used these words in their known and accepted signification, and intended thereby to confer upon city and village authorities power to license, regulate, and prohibit only such callings and vocations as might fall within the

terms employed in the act as thus known and understood. To concede that the power of the city to license, tax, or regulate the canvassing for books or publications within the city is doubtful is to deny the power. "Any fair, reasonable doubt concerning the existence of power is resolved against the corporation, and the power is denied": 1 Dillon on Municipal Corporations, 55–251.

While it must be conceded that the evil resulting from the method of canvassing from house to house may be great, — indeed, as great as that resulting from the vocations authorized by the statute to be taxed and regulated, and, indeed, may be even greater, — yet if the legislature, as we are constrained to hold, has not conferred upon cities and villages the power to tax or regulate the same, if relief is to be obtained, resort must be had to the legislative department of the state.

We are of opinion that so much of the ordinance as prohibits canvassing for books and publications in said city without obtaining a license therefor is void, for want of power in the city authorities to ordain the same, and appellant, not falling within the designation of a "hawker" or "peddler," was not amenable to prosecution under the valid portions of said ordinance.

The judgment of the circuit court is therefore reversed.

SCHOLFIELD, J., and BAILEY, J. We concur in reversing the judgment below, upon the ground that the ordinance is in conflict with the constitution of the United States, as held in *Robbins* v. *Shelby Taxing District*, 120 U. S. 489.

DEFINITIONS — "PEDDLER." — As to who is a "peddler" or a "hawker," see *Commonwealth* v. *Gardner*, 133 Pa. St. 284; 19 Am. St. Rep. 645, and note. A corporation cannot be a peddler, though one who is an itinerant, handling and vending the goods of a corporation, may be: *Wrought Iron Co.* v. *Johnson*, 84 Ga. 754. In *Ballou* v. *State*, 87 Ala. 144, it is decided that one cannot be convicted of peddling without a license by showing that he was an agent of a foreign corporation who manufactured stoves, that he traveled about in a two-horse wagon, carrying one stove with him, selling stoves by sample, taking the notes of purchasers as payment, payable upon the delivery of the stoves, and that he afterwards delivered such stoves, and received payment therefor.

BROWN v. DUNCAN.

[132 ILLINOIS, 413.]

SEPARATE EXECUTIONS MUST BE ISSUED WHEN. — Where the court orders each of the defendants in an action to pay a certain proportion of all the costs, execution can only properly issue against each of such defendants separately for that proportion, when assessed by the clerk. One is in no way liable for the costs adjudged against another, nor is any joint liability created by such order.

SPECIAL EXECUTIONS NOT AUTHORIZED WHEN. — A decree ordering each of the defendants in an action to pay a certain proportion of all the costs does not authorize the issuance of special executions. Except in cases provided for by the statute, executions, in Illinois, are general, and the right of the party in whose favor the writ is issued to elect on what property not exempt from execution he will have the same levied does not give him a right to a special execution.

EXECUTION MUST DESCRIBE JUDGMENT. — An execution must show upon what judgment or decree it is based, for and against whom it issues, the amount or amounts to be taken from the latter for the benefit of the former, and should also show the date at which, and the court where, the judgment was rendered. An execution which fails to show the judgment or decree upon which it issues is not, in legal contemplation, an execution at all, and confers no authority whatever upon the sheriff to whom it is directed.

SALE EN MASSE NOT AUTHORIZED BY EXECUTION WHEN. — Where a decree orders each of the defendants in a suit to pay his proportionate share of the costs and of a solicitor's fee, and awards execution to enforce payment, this does not authorize the sale of the property of the several defendants *en masse*. The amount awarded against each must be made out of his property, so that he may be able to redeem without paying the entire debt.

EJECTMENT. The opinion states the case.

Orendorff and Patton, for the appellant.

Gross and Broadwell, for the appellee.

WILKIN, J. This was an action of ejectment by appellant against appellee to recover possession of certain lands in Sangamon County. The judgment below was for the defendant, and plaintiff appealed.

The bill of exceptions fails to show any exception to the judgment, and appellee insists that for that reason it must be affirmed without reference to the merits of the case. Since the case was taken, appellant presented an amended record containing an amended bill of exceptions, which shows proper exceptions to the decision of the circuit court in overruling defendant's motion for a new trial, and entering judgment against him for costs. While this motion should have been made before the case was taken, we have treated the amended

record as properly before us, and examined the case upon the errors assigned.

Appellant's title to the lands in suit, if he has any, is derived through a sheriff's deed and an execution sale. At the February term of the Sangamon circuit court, 1885, in a partition proceeding in which Pamelia Melton and others were complainants and Lavina Brown and others were defendants, the final order contained the following: "It is further ordered that the costs and expenses of this proceeding, including a solicitor's fee of $125, which the court finds to be a reasonable fee, and usual and customary, and allows, be paid within twenty days from this date by said parties, in the following proportions, viz.: Isaac M. Brown, five ninths thereof; Lavina Brown, Albert Melton, Florence Melton, and James Melton, each one ninth thereof; and that in default thereof, execution issue therefor."

On the 8th of the following September a writ of execution was issued on said order, as is claimed, which is as follows: —

"The People of the State of Illinois, to the Sheriff of Sangamon County, greeting.

"We command you that of the following described real estate in your county, the property of James Melton, to wit [then follows a description of land], you cause to be made the sum of $20.36, — his proportion of the foregoing bill, — together with costs; and the following described real estate in your county, the property of Lavina Brown, to wit [description], you cause to be made the sum of $20.36, — her proportion of the foregoing bill, — together with costs; and that of the following described real estate in your county, the property of Isaac Brown, to wit [description], you cause to be made the sum of $101.80, — his proportion of the foregoing bill, — together with costs; and that of the following described re. l estate in your county, the property of Florence Melton, to wit [description], you cause to be made the sum of $20.36, — her proportion of the foregoing bill, — together with costs; and of the following described real estate in your county, the property of Albert Melton, to wit [description], you cause to be made the sum of $20.36, — his proportion of the foregoing bill, — together with costs; and that you make return, etc.

"In witness whereof, etc., this eighth day of September, A. D. 1885. E. R. ROBERTS, Clerk."

The sheriff's return shows that after offering the several tracts described in the execution as belonging to the respective

parties named therein, separately, and receiving no bids therefor, he offered all the tracts as a whole, and John E. Everhart bid $53.24 therefor, and became the purchaser, receiving a certificate of purchase and afterwards a sheriff's deed therefor. Everhart subsequently conveyed to appellant.

Conceding that the above-mentioned order in the partition proceeding was sufficient to authorize the issuing of executions against the respective parties therein named, this writ and the subsequent proceedings thereunder, relied upon by appellant as vesting title in his grantor, cannot be sustained. The most that could be claimed for them would be, that though irregular and voidable, they are not absolutely void. In the first place, the order does not authorize the issuing of a single writ against all of the parties. Each was ordered to pay a certain proportion of all the costs, and execution could only properly issue against each party separately for that proportion, when assessed by the clerk. One was in no way liable for the costs adjudged against another, nor was there, in any sense, a joint liability created by the decree; neither did the decree authorize the issuing of special executions. Except in cases provided for by statute, executions, in this state, are general: Rev. Stats., c. 77, sec. 4. The right of the party in whose favor the writ is issued to elect on what property not exempt from execution he will have the same levied does not, as is contended, give him a right to a special execution.

The fatal objection, however, to this writ appears on its face. It does not show for whose benefit it issued. It does not show upon what judgment or decree it is based, nor out of what court it issued. An execution must show for and against whom it issues, the amount or amounts to be taken from the latter for the benefit of the former, and should also show the date at which, and the court where, the judgment was rendered: Freeman on Executions, sec. 42; Herman on Executions, secs. 55, 56. It is true that a mere variance between the judgment upon which an execution issues, and the description of it in the writ, does not render it, or a sale and deed made in pursuance of it, void; but it is necessary that every execution should have a judgment to support it, and that it should appear from the execution what judgment is intended to be enforced.

The reason why the description of the judgment is inserted in the writ is, that the officer may know what he is to enforce, and that the writ may, by inspection, be connected with the authority for its issuance: Freeman on

Executions, sec. 43. How can it be determined whether an execution issued on a particular judgment, or whether there is a fatal variance between it and the writ, when none is set out or even mentioned in the writ? In a note to *Graham* v. *Price*, 13 Am. Dec. 199, in which the authorities, on the effect of a variance between an execution and the judgment on which it is based, are collated and commented upon by Mr. Freeman, he concludes: "The principle running through the cases is, that if the execution identify the judgment, it is sufficient; otherwise not." The judgment is the foundation of the execution. The vitality of the writ is drawn from the judgment. Failing to show the judgment or decree upon which it issued, this writ is not, in legal contemplation, an execution at all, and conferred no authority whatever upon the sheriff to whom it was directed.

Equally fatal to appellant's title is the objection that the writ, if it had been valid, did not authorize a sale of the various lots therein described *en masse*. Such was not the command of the writ. According to its express terms, Isaac M. Brown was liable for $101.80. That amount was to be made out of his property, and not out of that belonging to the other parties named in the writ, who were only liable for $20.36 each. It would scarcely be contended that the sheriff could, under this writ, have legally sold the property of James Melton for the aggregate amount due from all the parties, thus making him pay $183.20, when he was only liable for $20.36. It is equally clear that he could not sell it, with the lands of all the others, *en masse*, thereby compelling him, if he redeemed his lot, to pay the entire debt.

The judgment of the circuit court is clearly right, and will be affirmed.

EXECUTIONS — SPECIAL. — The issuing of a special execution upon a general judgment is an irregularity, and must be taken advantage of in a direct proceeding: *Swiggart* v. *Harber*, 4 Scam. 364; 39 Am. Dec. 418, and note.

EXECUTIONS — MUST DESCRIBE AND CONFORM TO JUDGMENT UPON WHICH ISSUED. — An execution must conform, substantially, to the judgment: *Graham* v. *Price*, 3 A. K. Marsh. 522; 13 Am. Dec. 199, and extended note. An execution must describe the judgment upon which it is founded; if it does, a clerical error will not vitiate it: *Avery* v. *Bowman*, 40 N. H. 453; 77 Am. Dec. 728. When a purchaser claims title under an execution sale, he must prove the judgment upon the execution issued: *Faull* v. *Cooke*, 19 Or. 455. Where a plaintiff seeks to amerce a sheriff for a failure to return an execution, the execution to sustain such a proceeding must conform strictly to the judgment: *Fuller* v. *Wells, Fargo, & Co.*, 42 Kan. 551.

EXECUTIONS — SALE EN MASSE. — Chattels sold on execution cannot be sold *en masse*, except under special circumstances: *McLeod* v. *Pearce*, 2 Hawks, 110; 11 Am. Dec. 741, and note; *Klopp* v. *Witmoyer*, 43 Pa. St. 219; 82 Am. Dec. 561, and note.

GRISWOLD *v.* HICKS.

[132 ILLINOIS, 494.]

COURT OF EQUITY HAS JURISDICTION TO IMPEACH DECREE FOR FRAUD AND COLLUSION. — A court of equity has jurisdiction of a bill filed by an infant to impeach a decree of the county court directing the sale of land to pay debts, when such infant's interest in the land is affected thereby, and there was fraud and collusion between the administrator and the guardian *ad litem* in concealing from the court the infant's interest in the land.

PARTY CANNOT COMPLAIN OF DECREE IN HIS FAVOR. — A party cannot complain of a portion of a decree which is solely for his benefit, and takes from him no right.

DEED CONSTRUED TO CONVEY ESTATE FOR LIFE WITH REMAINDER IN FEE. — A father executed a deed of conveyance of land to his four children, "and the heirs of their bodies, party of the second part." In the granting clause and the *habendum*, the words "heirs and assigns" were used without the words "of their bodies." Immediately preceding the *habendum* was inserted the clause: "Meaning and intending by this conveyance to convey to my said children the use and control of said real estate during their natural lives, and at their death to go to their children; should they die without issue, to their legal representatives." It was held to clearly appear from this clause that the grantor, by the use of the word "heirs," in other parts of the deed, meant "children," and the deed was construed to convey to the grantor's children a life estate only, with remainder in fee to their children.

WORD "HEIRS" MAY BE CONSTRUED TO MEAN "CHILDREN" WHEN. — The word "heirs," in a deed, may be construed to mean "children," when it clearly appears from other parts of the deed that it is not used by the grantor in its legal, technical meaning.

BILL in equity. The opinion states the case.

Palmer and Shutt, for the appellant.

James M. Riggs, for the appellees.

WILKIN, J. On the sixteenth day of September, 1867, William Hicks was the owner of four certain forty-acre tracts of land, and on that day conveyed the same to four of his children, by the following deed:—

"This indenture, made the sixteenth day of September, in the year of our Lord 1867, between William Hicks, of the county of Greene and state of Illinois, party of the first part, and Isham V. Hicks, William H. V. D. Hicks, Luther M.

Hicks, and Laura A. Hicks, and the heirs of their bodies, all of the same county and state, party of the second part,—

"Witnesseth, that the said party of the first part, for and in consideration of the sum of forty dollars (being from each child ten dollars) in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, and the said party of the second part forever released and discharged therefrom, has remised, released, sold, conveyed, and quitclaimed, and by these presents does remise, release, sell, convey, and quitclaim unto the said party of the second part, their heirs and assigns, as aforesaid, forever, all the right, title, interest, claim, and demand which the said party of the first part has in and to the following described lots, pieces, or parcels of land, to wit: To Isham V. Hicks, the northwest quarter of the northwest quarter of section twenty-eight (28); to William H. V. D. Hicks, the southwest quarter of the southwest quarter of section No. twenty-eight (28); to Luther M. Hicks, the east half of the east half of the southeast quarter of section No. twenty-nine (29); and to Laura A. Hicks, the west half of the east half of the southeast quarter of section twenty-nine,—all in township No. twelve (12) north, of range No. twelve (12) west, of the third principal meridian, containing in all 160 acres of land; and to each child forty acres, all lying and being in Greene County, Illinois,—meaning and intending by this conveyance to convey to my said children the use and control of said real estate during their natural lives, and at their death to go to their children; should they die without issue, to their legal representatives,—to have and to hold the same, together with all and singular the appurtenances and privileges thereunto belonging or in any wise thereunto appertaining, and all the estate, right, title, interest, and claim whatsoever of the said party of the first part, either in law or equity, to the only proper use, benefit, and behoof of the said party of the second part, their heirs and assigns, forever; and the said William Hicks, party of the first part, hereby expressly waives, releases, and relinquishes unto the said party of the second part, their executors, administrators, and assigns, all right, title, claim, interest, and benefit whatever in and to the above-described premises, and each and every part thereof, which is given by or results from all laws of this state pertaining to the exemption of homesteads; and the said party of the first part, for himself and his heirs, executors, and administrators, doth covenant, promise, and agree,

to and with the said party of the second part, their heirs, executors, administrators, and assigns, that he hath not made, done, committed, executed, or suffered any act or acts, thing or things, whatsoever, whereby or by means whereof the above mentioned and described premises, or any part or parcel thereof, now are, or at any time hereafter shall or may be, impeached, charged, or encumbered in any way or manner whatsoever.

"In witness whereof, the said party of the first part hereunto sets his hand and seal the day and year above written.

[Seal.] "WILLIAM his × mark. HICKS."

After the execution and delivery of this deed, the said Laura A. Hicks, one of the grantees, having intermarried with one Charles Hogg, conveyed the said west half of the east half of the southeast quarter to the said Luther M. Hicks, and the latter thereupon took possession thereof, together with said east half of the east half of the southeast quarter conveyed to him by his father, and continued in such possession until September 20, 1888, when he died, leaving Lucy J. Hicks, his widow, and appellees, his only children. On the twenty-eighth day of September, 1886, the said Luther M. Hicks and his wife, Lucy J., conveyed, by mortgage deed of that date, both of said forty-acre tracts to appellant, to secure the payment of two thousand four hundred dollars. On the first day of October, 1888, Isham Roberts was duly appointed administrator of the estate of Luther M., and afterwards, on his petition,—to which said widow and this appellant and these appellees were made parties,—the county court of said Greene County ordered him to sell all of said land, to pay debts theretofore allowed against said estate. The said widow claimed homestead and dower in said land, but consented, in writing, that it might be sold, she to take out of the proceeds. Appellant also consented to such sale, his mortgage to be first satisfied out of the fund arising therefrom. This is a bill in chancery, by appellees, infants, by next friend, against appellant, the said widow and administrator, to remove said order of said county court as a cloud on their title to the east half of the east half of the southwest quarter, described in said deed.

In addition to the foregoing facts, the bill charges that while complainants were made parties to the petition of said administrator in said county court, being infants, they were repre-

sented therein only by a guardian *ad litem*, who, by agreement and collusion with appellant and said administrator, did not fairly represent their interests, and that their ownership in said lands was concealed from said court. The bill also alleges that the said Laura A. Hogg is still living, but has no heirs of her body.

To the bill the appellant filed a general demurrer, which was overruled, and the defendant elected to abide by the same. Thereupon a decree was rendered in favor of appellees, which found and adjudged that said Luther M. Hicks took only a life estate in the forty acres conveyed to him by William Hicks, and that appellees took the remainder in fee-simple; and as to this forty acres, appellant's mortgage and the said county court proceedings were held to be a cloud upon appellees' title, and were decreed to be null and void. As to the forty acres conveyed to said Luther M. by Laura A. Hogg, the decree complained of found that at the time of said Luther M.'s death he owned an estate therein, which is liable to be sold to pay his debts, subject to the appellant's rights under his mortgage, and subject to the rights of said widow; and it is decreed that said administrator sell the same under his said county court decree, and dispose of the proceeds in due course of administration. The decree also found that there was collusion in the procurement of the said decree in the county court. The defendant Griswold alone appeals.

The theory of the bill is, that the deed from William Hicks to the father of the complainant vested only a life estate in him to the land conveyed, with remainder in fee to his children. This theory, of course, concedes that the estate of Luther M. Hicks has no interest or title in the other forty-acre tract beyond the life of Laura A. Hogg.

It is first insisted that whatever rights appellees have, as disclosed by their bill, are enforceable in the county court, and therefore they have no right to come into a court of chancery for relief. We do not deem it important on this point to determine whether the *status* of the proceeding by the administrator in the county court is such as that appellees could attack the decree in question in that court. Under the facts well pleaded in this bill, and which are, of course, admitted by the demurrer, — the complainants below being infants, — the jurisdiction of a court of equity may unquestionably be invoked, and the decree of the county court impeached for fraud and collusion: *Loyd* v. *Malone*, 23 Ill. 44; 74 Am. Dec. 179; *Kuck-*

enbeiser v. *Beckert*, 41 Ill. 172; *Lloyd* v. *Kirkwood*, 112 Ill. 329.

It is next contended that the decree, in so far as it deals with the tract conveyed by Laura A. Hogg to the father of appellees, is erroneous. That part of the decree is solely for the benefit of appellant. It gives appellees no right in that tract. It takes from appellant no right which he had therein under his mortgage or the decree of the county court. There is therefore certainly no error in it of which he can complain.

The principal question in the case is, Are appellees the owners in fee of the east half of the east half of the southeast quarter described in the bill? — the decision of which depends solely upon the construction to be placed on the deed from William Hicks to their father. But for the rule in Shelley's case, there would be no ground for controversy on this question. The deed clearly shows upon its face an intention on the part of the grantor to vest a life estate in the father of appellees, and the remainder in fee in his children. If, however, the language of the deed brings it within that rule, then intention goes for naught, and its legal effect must control.

The deed, it will be seen, is not skillfully drawn, resulting, no doubt, in part, from the use of a blank form. If the word "heirs," when used the second time in the deed in the granting clause, can with certainty be said to mean "heirs of their bodies," as expressly stated immediately following the names of the grantees, then the rule in Shelley's case, as at common law, would have no application, our statute expressly providing in such case that he who would by the common law have taken a fee-tail shall become seised for his natural life only, and the heirs of his body, tenants in tail according to the common law, take the fee: Rev. Stats., c. 30, sec. 6, tit. Conveyances; *Butler* v. *Huestis*, 68 Ill. 594; 18 Am. Rep. 589. We are inclined to think that such is the proper construction of the language used. The usual language in the form of deeds here used, in that part of it where the word "heir" is used the second time, is, "sell, convey, etc., unto the said party of the second part, their heirs and assigns forever." Here, it will be observed, after the words "heirs and assigns" are used the unusual words "as aforesaid," which would seem naturally to relate back to the former use and qualification of the word "heirs."

However, we do not regard it important, in the decision of

the point under consideration, to maintain this construction, for while, if the requisite limitations to the ancestor and his heirs is found in the instrument, the rule must apply, whether the grantor so intended or not; in other words, while the question as to whether the grantor intended the rule to apply cannot arise, nevertheless it may be shown by other parts of the deed that the word "heirs" was not used by him in its legal, technical meaning: *Carpenter* v. *Van Olinder*, 127 Ill. 42; 11 Am. St. Rep. 92; *Allen* v. *Croft*, 109 Ind. 476; 58 Am. Rep. 425. See also *Shimer* v. *Mann*, 99 Ind. 190; 50 Am. Rep. 82. In this last case, Elliott J., says: "We have no doubt that the word 'heirs' may be construed to mean children, where it is plain that the testator employed it in that sense"; citing numerous cases. It is true that it must clearly appear that the word was used in a different sense from that which the law attaches to it. In the case just cited, Judge Elliott quotes from Lord Redesdale in *Jesson* v. *Wright*, 2 Bligh, 56, the following language: "The rule is, that the technical words shall have their legal effect, unless from subsequent inconsistent words it is very clear that the testator meant otherwise." Also, from Lord Denman in *Doe* v. *Gallini*, 5 Barn. & Adol. 621: "Technical words, or words of known legal import, must have their legal effect, even though the testator uses inconsistent words, unless these inconsistent words are of such a nature as to make it perfectly clear that the testator did not mean to use the technical words in their proper sense."

In *Urich's Appeal*, 86 Pa. St. 386, 27 Am. Rep. 707, the case is stated in the *syllabus*, as follows: "A testator devised lands to his children and their 'heirs' by a separate clause. By a subsequent clause he declared that none of the children should have a right to sell or encumber the lands, but 'the land shall remain free for their children or heirs, and they (my said children) shall have the use, income, and profit of said lands and farms during their lifetime.' By a still later clause he gave them the power to dispose of their interest by will, as aforesaid." Held, that the testator's children took but life estates. In the opinion, Agnew, C. J., says: "We agree with all said upon the first expression of this devise, if the testator intended to give him a fee, and used the word 'heirs' in its legal acceptation. But that intention is the pivot of the question, and must be carefully gathered from all parts of the will."

The clause, in this deed, "meaning and intending by this

conveyance to my said children the use and control of said real estate during their natural lives, and at their death to go to their children; should they die without issue, to their legal representatives," shows, beyond question, that William Hicks used the word "heirs" in this deed, not in its legal sense, but as meaning children. Counsel for appellant call this clause a memorandum, and say: "If it can be regarded as a part of the deed, it can have no greater effect than is given to the *habendum* clause of which it is a part." Why should it not be considered a part of the deed? And why say it is a part of the *habendum* clause? It does appear to be a part of the deed. It is in no way connected with the *habendum*, except that it immediately precedes it. It is a separate, independent statement of the grantor, from which it clearly appears that by the use of the word "heirs" he meant children, and serves no other purpose.

We think the decree of the circuit court was right, and it will be affirmed.

EQUITY — JUDGMENT PROCURED BY FRAUD. — As to when a court of equity has jurisdiction to relieve against a judgment procured through fraud, see *Greenwaldt* v. *May*, 127 Ind. 511; *post*, p. 660, and note; also note to *Oliver* v. *Pray*, 19 Am. Dec. 603–612.

A PARTY CANNOT COMPLAIN OF A DECREE IN HIS FAVOR, OR ONE WHICH DEPRIVES HIM OF NO RIGHT. — A defendant cannot appeal from a judgment in his favor, as he was not aggrieved by the result of the trial below: *Ringgold* v. *Barley*, 5 Md. 186; 59 Am. Dec. 107. Irregularity in the form of the judgment not prejudicial to appellant cannot be complained of: *Chever* v. *Horner*, 11 Col. 68; 7 Am. St. Rep. 217.

CONSTRUCTION OF WORDS "HEIRS" AND "CHILDREN," AS USED IN CONVEYANCES OR WILLS: *Estate of Hunt*, 133 Pa. St. 260; 19 Am. St. Rep. 640, and note; *Waddell* v. *Waddell*, 99 Mo. 338; 17 Am. St. Rep. 575, and note; *Carpenter* v. *Van Olinder*, 127 Ill. 42; 11 Am. St. Rep. 92, and extended note. The words "bodily heirs" are used in the sense of children: *Mitchell* v. *Simpson*, 88 Ky. 125. The words "heirs," "lineal heirs," "heirs of the body," "issue," or words of similar import, will be held to mean children: *Craig* v. *Ambrose*, 80 Ga. 134. The word "heirs" has a well-known technical meaning; it will be given that meaning, unless it clearly appears from the context of the will that a different one was intended: *Wallace* v. *Minor*, 86 Va. 550.

MOBILE AND OHIO RAILROAD CO. *v.* PEOPLE.

[122 ILLINOIS, 559.]

POWER OF RAILWAY COMPANY TO LOCATE STATIONS ON ITS ROAD. — A railway company cannot be compelled, on the one hand, to locate stations on its road at points where the cost of maintaining them will exceed the profits resulting therefrom to the company, nor allowed, on the other hand, to locate them so far apart as to practically deny to communities on the line of the road reasonable access to its use.

RAILWAY COMPANY CANNOT BE COMPELLED TO CONTINUE STATION WHEN. — A railway company cannot be compelled to maintain or continue a station at a point when the welfare of the company and of the community in general requires that it should be changed to some other point.

RAILWAY COMPANY CANNOT BIND ITSELF BY CONTRACT TO MAINTAIN STATIONS AT PARTICULAR POINTS. — A railway company cannot bind itself by contract with individuals to locate and maintain stations at particular points, or to not locate and maintain them at other points. The company should be left free to establish and re-establish its depots wherever the accommodation of the wants of the public may require. The power to locate stations is, from its nature, a continuing one.

MANDAMUS NOT AWARDED WHERE RIGHT IS DOUBTFUL. — A *mandamus* will never be awarded unless the right to have the thing done which is sought is clearly established. If the right is doubtful, the writ will be refused.

PETITION for *mandamus* by the attorney-general. The petition, among other things, set forth that the Cairo and St. Louis Railroad Company was incorporated in 1865, with power to construct and operate a railroad from East St. Louis to Cairo; that it did own and operate said road until 1882; that it established a station named Hodges Park at the time of constructing the road, at which were located and maintained a depot, side-track, offices, and conveniences for receiving and discharging freight and passengers; that during all the time of the operation of the road by this company its trains were accustomed to stop at said station; that as an inducement to locate the station at that point, citizens residing near and citizens of the village of Hodges Park caused to be conveyed to the company, free of cost, certain lots of land for its own use and to be used by it in the operation of its road, and furnished it lumber and other material for the construction of its depot buildings, and furnished it other valuable aid; that in 1882 the St. Louis and Cairo Railroad Company was incorporated, and acquired and succeeded to the property, rights, privileges, and franchises of the Cairo and St. Louis Railroad Company, above mentioned, and up to February 1, 1886, continued to own and operate said line of railroad, and during all said time

maintained at Hodges Park a station, depot, offices, and conveniences for receiving and discharging passengers and freight, and was accustomed to stop its trains there daily; that Hodges Park, during said time, has grown to be a village of three or four hundred inhabitants, who have acquired property and engaged in business thereat, relying upon said village being and remaining a station upon said railroad; that said village contained sixty dwelling-houses, two general merchandise stores, one drug-store, two school-houses, three churches, a hotel, post-office, railroad depot, telegraph-office, and saw-mill, and contains about sixty-five families resident therein; that the railroad passes through said village, and the depot heretofore established was located within convenient reach of the business houses and residents of said village; that on February 1, 1886, the Mobile and Ohio Railroad Company leased said railroad and its equipments from said St. Louis and Cairo Railroad Company for ninety-nine years, and took possession of said railroad, its equipments, and other property, and has ever since operated said railroad under said lease as a public carrier; that it was and is the duty of said Mobile and Ohio Railroad Company to keep and maintain and keep open a station-house and depot at Hodges Park at all suitable times for the accommodation of passengers and of persons desiring the carriage of freight over said railroad, and to stop its passenger and freight trains there daily for that purpose; that said company does run a sufficient number of trains daily to accommodate the public if properly operated, but that, disregarding its duty in the premises, it did, on the 1st of July, 1887, refuse and neglect, and from that time hitherto has refused and neglected, and still does refuse and neglect, to keep and maintain at Hodges Park a depot, etc., for the convenience and accommodation of persons desiring the transportation of passengers or freight from or to said station, and since said time has refused and neglected, and still does refuse and neglect, to stop its trains, either freight or passenger, at said station of Hodges Park, though often requested so to do by the citizens of Hodges Park and by the railroad and warehouse commission of the state of Illinois. The relator, by an amendment to the petition after demurrer sustained, further alleged that the said Mobile and Ohio Railroad Company, at the time it took the lease above mentioned, had due notice of the condition under which the depot and station at Hodges Park were

located, and of the granting of the above-mentioned lots of land to said Cairo and St. Louis Railroad Company, in consideration of which said depot and station were to be maintained and operated by it and its successors. The petitioner prayed for a writ of *mandamus* commanding the respondent to cause the trains operated upon its line of railway, or a sufficient number of them to accommodate the public, to stop daily at said station of Hodges Park, for the purpose of receiving and discharging freight and passengers, and requiring it to keep and maintain at said station such depots or station-houses, offices, side-tracks, and agents as shall be necessary for the convenience and accommodation of the public in receiving and discharging passengers and freight thereat; and that upon the final hearing, such further order may be made in the premises as to the court shall seem meet and proper. The petition was verified. The answer alleged the incorporation of the Cairo and St. Louis Railroad Company in 1865, the building of the road by it in 1875, and that it put up a small station-house at Hodges Park and made it a stopping-place for a part of its trains, but that there was no contract or agreement by which it became a stopping-place, nor was any property conveyed to it or given to it as an inducement to the company to make it a station or stopping-place; that in 1877 the possession and control of the road passed into the control of Henry W. Smithers, receiver; that the road was in 1881 sold under a decree of foreclosure to Josiah A. Horsey and Charles J. Canda, who in 1882 conveyed it to the St. Louis and Cairo Railroad Company, which operated it until February 1, 1886, when it leased it to defendant for a period of forty-five years; that during the time the St. Louis and Cairo Railroad Company operated the road it stopped a part, but only a part, of its trains at Hodges Park, and that long prior to the 1st of February, 1886, it had decided to discontinue this station, and to make the station or stopping-place half a mile farther north, and defendant has only done what the St. Louis and Cairo Railroad Company had decided to do, in view of the needs and demands of the public, and of its own interests as a carrier of passengers and freight; that defendant has built a depot building on its road just 2,850 feet north of the station-house at Hodges Park, in a much more convenient location for the public; that Hodges Park contains less than two hundred people, and has always done very little business of any kind, being on the very edge of a large

agricultural district lying entirely north of it, and that from Hodges Park southward there is scarcely a farm of any kind for a distance of six miles; that four fifths of the people who formerly went to the Hodges Park station had to pass by the present station on their way there; that all the public roads in the vicinity lead to the present station, and that the only bridge over the Cache River is only two or three hundred yards northeast of the present station; that to only a few people in Hodges Park is the present station less convenient than the former one, and to everybody else interested the present station is much more convenient than the former one; that defendant has changed the road from a narrow to a standard gauge, and largely increased its business, and that its wants and needs and those of the public require the location of its stations at the most convenient places, and that it is neither just nor equitable that its hands should be tied by what the other companies may have done or omitted. The answer denied that the defendant or its lessor ever had any knowledge of any agreement between the Cairo and St. Louis Railroad Company and any one else that Hodges Park should become or be a station on that road. A demurrer to the answer having been sustained, with leave to amend, the defendant inserted this paragraph: "This defendant says that it made the change in the location of its depot building or station as above stated because the wants and demands of the public required the change or removal to be made, and because of the further fact that at the present location the defendant could obtain grounds for the putting in of tracks, and the making of other necessary improvements and facilities for the transaction of the business of the defendant at that point and in that neighborhood, and that at the former location such grounds could not be obtained. And defendant further says the business of said Hodges Park and of the vicinity and neighborhood would not justify or require the maintenance of the two places or points as stations, and that the business of Hodges Park does not require that the station should be maintained as formerly for its benefit or accommodation, without regard to the wants and requirements of the neighborhood at large." The circuit court awarded the *mandamus*, and the company sued out a writ of error.

Lansden and Leek, for the plaintiff in error.

George Hunt, attorney-general, for the people.

SCHOLFIELD, J. Railway stations for the receipt and discharge of passengers and freight are for the profit and convenience of both the company and the public. Their location at points most desirable for the convenience of travel and business is alike indispensable to the efficient operation of the road and the enjoyment of it as a highway by the public. Necessarily, therefore, the company cannot be compelled, on the one hand, to locate stations at points where the cost of maintaining them will exceed the profits resulting therefrom to the company, nor allowed, on the other hand, to locate them so far apart as to practically deny to communities on the line of the road reasonable access to its use. The duty to maintain or continue stations must manifestly rest upon the same principle, and a company cannot therefore be compelled to maintain or continue a station at a point, when the welfare of the company and the community in general requires that it should be changed to some other point; and so we have held that a railway company cannot bind itself, by contract with individuals, to locate and maintain stations at particular points, or to not locate and maintain them at other points: *Bestor* v. *Wathen*, 60 Ill. 138; *Linder* v. *Carpenter*, 62 Ill. 309; *Marsh* v. *Fairbury, Pontiac, and Northwestern R. R. Co.*, 64 Ill. 414; 16 Am. Rep. 564; *Snell* v. *Pells*, 113 Ill. 145; *St. Louis, Jacksonville, and Chicago R. R. Co.* v. *Mathers*, 71 Ill. 592; 22 Am. Rep. 122; 104 Ill. 257.

The power of election in the location of the line of the railway referred to in *People* v. *Louisville and Nashville R. R. Co.*, 120 Ill. 48, results from the franchise granted by the charter to exercise the right of eminent domain, and is therefore totally different from the power of locating stations, which, from its very nature, is a continuing one. And so we said in *Marsh* v. *Fairbury, Pontiac, and Northwestern R. R. Co.*, 64 Ill. 414, 16 Am. Rep. 564, where a bill had been filed for the specific performance of a contract to locate and maintain a station at a particular point: "Railroad companies, in order to fulfill one of the ends of their creation, — the promotion of the public welfare, — should be left to establish and re-establish their depots wherever the accommodation of the wants of the public may require." And so, again, we said in *St. Louis, Jacksonville, and Chicago R. R. Co.* v. *Mathers*, 71 Ill. 592, 22 Am. Rep. 122: "Whenever the public convenience requires that a station on a railroad should be established at a particular point, and it can be done without detriment to the

interests of the stockholders, the law authorizes it to be established there, and no contract between the board of directors and individuals can be allowed to prohibit it." And in the very recent case of *People* v. *Chicago and Alton R. R. Co.*, 130 Ill. 175, where we awarded a *mandamus* commanding the location and maintaining of a station at a point where no station had before been located and maintained, we said: "It is undoubtedly the rule that railway companies, in the absence of statutory provisions limiting and restricting their powers, are vested with a very broad discretion in the matter of locating, constructing, and operating their railways, and of locating and maintaining their freight and passenger stations. This discretion, however, is not absolute, but is subject to the condition that it must be exercised in good faith, and with a due regard to the necessities of the public."

The rule has been so often announced by this court that it is unnecessary to cite the cases that a *mandamus* will never be awarded unless the right to have the thing done which is sought is clearly established. If the right is doubtful, the writ will be refused. The burden was on the relator to prove a case authorizing the issuing of the writ, and, in our opinion, that proof has not been made. The evidence does show that there are, of all ages and sexes, 182 persons residing in Hodges Park, who are, by the change of the station, a little beyond a half a mile farther from the station; but the evidence not only fails to show that they are a majority of the people resorting to that station for business or travel, or that they furnish the majority of the freight received or shipped at that station, but it shows directly the reverse. It is not shown that there are either mining or manufacturing interests that would be accommodated by retaining the station at Hodges Park, and so far as appears from the evidence, the business there is only that incident to the ordinary railway station in an agricultural community. The evidence shows that, with a few unimportant exceptions, the entire farming interests of the country accessible either to Unity or to Hodges Park are best subserved by the change made of the station. Thus John Hodges, a native of Unity, who was sheriff of the county for ten years, and who also at one time filled the office of the county treasurer, and who was thoroughly acquainted with the country in the vicinity of Unity and Hodges Park, testified: "The new station is more convenient for the great majority of the people. The distance between the two depot

buildings is 2,850 feet. I know of none to whom Hodges Park is more convenient than Unity, besides the people of Hodges Park. In going to Hodges Park to transact business, nine tenths of the people have to pass by Unity, and so in returning." M. Easterday, who resided in Cairo, but who was a real estate agent, and thoroughly familiar with the country and people in the vicinity of Unity and Hodges Park, testified to the effect that the chief part of the farming country was nearer to Unity than to Hodges Park, and that the roads and bridges favored travel to the former place; and he said: "Unity is as much nearer the greater portion of the improved surrounding country as the distance from Unity to Hodges Park. I know of no one, beside the people of Hodges Park, to whom the present station is less convenient than the former one. Unity is more convenient to the farmers of the community." As we understand the record, this evidence is not contradicted.

Charles Hamilton, the superintendent of respondent's road, testified, among other things: "There were two or three reasons for the removal of the station at Hodges Part to the other location. There was but a little side-track at Hodges Park, and there is one half a mile long at Unity. At Hodges Park the right of way is only fifty feet on each side of the track, and there was no room to build a side-track, for the reason that the village street is on one side and a slough on the other; and besides, there was not business enough to sustain a station at both points." This evidence is unimpeached and uncontradicted in any respect, and must therefore be accepted as true.

In *People* v. *Louisville and Nashville R. R. Co.*, 120 Ill. 48, and *People* v. *Chicago and Alton R. R. Co.*, 130 Ill. 175, the facts were settled by the pleadings, and left no question but that the public welfare required stations to be maintained at the points where we held they should be maintained, and there is therefore nothing in either of those cases that militates against our conclusion here.

The judgment of the circuit court is reversed, and the cause is remanded to that court, with direction to enter judgment for the respondent.

RAILROADS — LOCATION OF STATIONS. — The refusal of a railroad to designate as a station an unincorporated town situated within three miles of a regular station is a reasonable regulation: *Railway* v. *Adcock*, 52 Ark. 406; *People* v. *Chicago etc. R'y Co.*, 130 Ill. 175.

RAILROADS CANNOT BIND THEMSELVES BY CONTRACT TO MAINTAIN A STATION AT ANY PARTICULAR POINT: See *Williamson* v. *Chicago etc. R'y Co.*, 53 Iowa, 126; 36 Am. Rep. 206, and extended note 214–216.

MANDAMUS — RIGHT TO, MUST BE CLEARLY ESTABLISHED. — *Mandamus* is not a writ of right, but a prerogative writ which issues only upon a proper case clearly proven to the court: *State* v. *Kirke*, 12 Fla. 278; 95 Am. Dec. 314, and note; *Reading* v. *Commonwealth*, 11 Pa. St. 196; 51 Am. Dec. 534; extended note to *Freon* v. *Carriage Co.*, 51 Am. Rep. 798–801. A writ of *mandamus* will not issue in case of a doubtful right: *People* v. *New York I. Asylum*, 122 N. Y. 190. *Mandamus* can only be invoked in cases where a clear legal right is invaded: *State* v. *Bonnell*, 119 Ind. 494; *Swigert* v. *County of Hamilton*, 130 Ill. 539; *Commonwealth* v. *Fitler*, 136 Pa. St. 129; *Port Royal etc. Co.* v. *Hagood*, 30 S. C. 519.

MOORE *v.* WILLIAMS.

[132 ILLINOIS, 589.]

FORMER ADJUDICATION OPERATES AS ESTOPPEL WHEN. — A prior adjudication of the same subject-matter between the same parties, although in a different mode of proceeding, operates as an estoppel upon the parties against subsequent litigation, as to all matters that were actually in controversy and decided in that adjudication. Therefore a party who has established his title to land by a decree in chancery, under which he has been put into possession, will be estopped from prosecuting to judgment an action of ejectment to recover possession of the same land.

APPEAL FROM DECREE DOES NOT DESTROY ITS EFFECT AS FORMER ADJUDICATION. — An appeal from a decree does not vacate or set it aside, but simply suspends its operation, leaving it in full force as a merger of the cause of action, and a bar to its further prosecution.

EJECTMENT. The opinion states the case.

W. H. Williams, for the appellants.

George C. Ross and C. H. Layman, for the appellees.

SCHOLFIELD, J. This was ejectment by appellants against appellees. The court below held that appellants were estopped from prosecuting the suit to judgment in their behalf, by a decree in chancery in that court, between the same parties and in regard to the same subject-matter, the court of chancery having jurisdiction of the subject-matter; and that ruling presents the only question that it is necessary to decide upon this record.

The doctrine is of familiar application in this court that a prior adjudication of the same subject-matters between the same parties, although in a different mode of proceeding, operates as an estoppel upon the parties against subsequent litigation, at least as to all matters that were actually in

controversy and decided in that adjudication: *Garrick* v. *Chamberlain*, 97 Ill. 620; *Hawley* v. *Simons*, 102 Ill. 115; *Hamilton* v. *Quimby*, 46 Ill. 98; *Hanna* v. *Read*, 102 Ill. 596; 40 Am. Rep. 608. But it seems to be thought by counsel for appellants that the fact that an appeal has been prosecuted from the decree destroys it as a former adjudication. This is a misapprehension. The appeal does not vacate or set aside the decree; it simply suspends its execution, and leaves it in full force as a merger of the cause of action and a bar to its further prosecution: *Curtis* v. *Root*, 28 Ill. 367; *Oakes* v. *Williams*, 107 Ill. 154; *Nill* v. *Comparet*, 16 Ind. 107; 79 Am. Dec. 411; *Burton* v. *Burton*, 28 Ind. 342; *Bank of North America* v. *Wheeler*, 28 Conn. 433; Freeman on Judgments, sec. 328. Moreover, the evidence shows that appellants, notwithstanding their appeal, have had that part of the decree which is in their favor executed. They were awarded a writ of possession, which they have had issued, and by virtue of it they have been placed in the actual possession of the property here sued for, and it is therefore impossible that they could, in any view, recover, by a judgment in this suit, anything they do not already have without a judgment.

The judgment is affirmed.

JUDGMENTS — FORMER ADJUDICATION ACTS AS ESTOPPEL WHEN. — The estoppel of a former judgment extends to every material matter within the issues which was expressly litigated and determined: *Huntley* v. *Holt*, 59 Conn. 102; 21 Am. St. Rep. 71, and note; *Peterson* v. *Weissbein*, 80 Cal. 38. Title to real estate assailed by a party, and determined against him, cannot again be questioned by him: *Foster* v. *Hinson*, 76 Iowa, 714. An action against an executor for conversion is barred by a previous action against him by the same parties, in which they recovered the proceeds of the sale of the property alleged as having been the subject of his conversion: *Bradley* v. *Brigham*, 149 Mass. 141.

JUDGMENTS, CONCLUSIVENESS OF — APPEAL. — An appeal from a judgment does not affect the application of the doctrine of *res judicata*: *Peters* v. *Banta*, 120 Ind. 416. Recitals in judgments are conclusive until reversed upon appeal, or set aside in a direct proceeding: Note to *Gould* v. *Steinburg*, 15 Am. St. Rep. 143; a bill to review a judgment is such an attack: *Herff* v. *Griggs*, 121 Ind. 471. An appeal from an order sustaining a demurrer to a complaint having been dismissed on the ground that the right to appeal was waived by filing an amended complaint, the plaintiffs cannot question the correctness of such an order upon an appeal from the judgment obtained on such amended complaint: *Hooker* v. *Village of Brandon*, 75 Wis. 8. Where a cause is submitted to a court without a jury, the judgment of the court is equivalent to the verdict of a jury, and the appellate court cannot question the sufficiency of the evidence to support the judgment: *Quillman* v. *Gurley*, 85 Ala. 594.

CASES

IN THE

SUPREME COURT

OF

INDIANA.

DAVIS *v.* STOUT.

[126 INDIANA, 12.]

NEGOTIABLE INSTRUMENTS — EXTENSION OF TIME FOR PAYMENT OF NOTE — WANT OF CONSIDERATION. — A contract between the payor and payee of a promissory note, entered into after principal and interest are due, and reciting that, in consideration of certain payments at certain times, to avoid litigation, and for other considerations, the time is to be extended to a date mentioned therein, and a pending suit on the note dismissed, is void, as being without consideration, in the absence of extrinsic allegations showing a valid consideration for the contract of forbearance.

NEGOTIABLE INSTRUMENTS — VOID EXTENSION OF TIME FOR PAYMENT OF NOTE WILL NOT RELEASE SURETY. — A contract for an extension of time in which to pay a promissory note, void for want of consideration, will not release the surety thereon.

NEGOTIABLE INSTRUMENTS — RATE OF INTEREST ON NOTE CANNOT BE VARIED BY PAROL. — Where a promissory note fixes the rate of interest thereon, parol evidence is not admissible to show that subsequent to its execution a different rate of interest was agreed upon.

F. T. Hord and M. D. Emig, for the appellants.

M. Hacker and C. F. Remy, for the appellee.

ELLIOTT, J. The promissory note upon which the appellee's complaint is founded was executed by Jacob Davis as principal, and by Eliza J. Davis as surety. It was executed in April, 1878, and became due May 4, 1878.

The principal debtor sets forth in his answer this contract with the payee: —

"November 29th, 1886.

"In consideration of the payment of three hundred dollars, the receipt of which is hereby acknowledged, and three hundred on or before May the 1st, 1887, and three hundred dollars August 1st, 1887, and balance on or before Decem-

ber 25th, 1887, and to avoid litigation, and other considerations, the time on note held against Jacob Davis and Eliza J. Davis is to be extended to the above stipulated time, and suit now pending in Bartholomew circuit court dismissed. ABNER STOUT."

Counsel argue that the contract evidences a re-loan of the money to Jacob Davis, and that it merges the original note so that no action can be maintained upon it. This contention cannot prevail. The words of the instrument are, that "the time on the note held against Jacob Davis and Eliza J. Davis is to be extended to the above stipulated time," and there can be no doubt as to their meaning and effect. They do not extinguish the note; on the contrary, they expressly continue it in force, and provide for an extension of the time of payment. If, therefore, it should be granted that the contract extending the time of payment is effective, still the note itself is not extinguished.

The contract is not valid, for the reason that it is without consideration. It does not belong to the class of contracts in which a consideration is implied, nor do the recitals show a consideration; neither is there any extrinsic averment showing a valid consideration for the agreement of forbearance. The principal and interest of the note were due when the payments were made and the agreement extending the time of payment entered into; hence it is plain that the payors of the note neither did anything they were not already under a binding and legal obligation to do, nor undertook to do anything that they were not already bound to perform: *Harris* v. *Cassady*, 107 Ind. 158; *Laboyteaux* v. *Swigart*, 103 Ind. 596; *Fensler* v. *Prather*, 43 Ind. 119; *Ritenour* v. *Mathews*, 42 Ind. 7; *Reynolds* v. *Nugent*, 25 Ind. 328.

It does not appear, either in the recitals of the contract, or by extrinsic averments, that the payors of the note had any defense; but for aught that is alleged their claim was utterly groundless; and it is well settled that a foundationless claim will not support an agreement of compromise: *Harris* v. *Cassady*, 107 Ind. 158, and cases cited; *Smith* v. *Boruff*, 75 Ind. 412. An agreement of compromise or of forbearance requires a consideration: *Holmes* v. *Boyd*, 90 Ind. 332; *Henry* v. *Gilliland*, 103 Ind. 177; *Roberts* v. *Richardson*, 39 Iowa, 290; *Costello* v. *Wilhelm*, 13 Kan. 229; *Dillon* v. *Russell*, 5 Neb. 484. What we have said fully disposes of the case as to the principal debtor.

The surety is in no better situation than her principal, if it be true that the contract of forbearance was without consideration; for while it is true that a contract of extension founded upon a consideration will release the surety, it is also true that where there is no consideration for the contract, the surety will not be released: *Holmes* v. *Boyd*, 90 Ind. 332; *Henry* v. *Gilliland*, 103 Ind. 177; *Cates* v. *Thayer*, 93 Ind. 156; *Hume* v. *Mazelin*, 84 Ind. 574.

The terms of a promissory note cannot be varied or contradicted by parol; and hence it was not competent for the defendants to aver that the note drew only six per cent interest, for the note fixes the rate of interest at ten per cent. Nor was it competent for the parties to vary the subsequent written contract, if it be conceded to be a valid one; and as that contract does not provide that the rate of interest shall be less than that fixed by the note, parol evidence was not admissible upon that point. The subsequent writing does, indeed, purport to confirm and continue the note and all its incidents in force; and the utmost that can be said, conceding it to be valid, is, that it assumes to extend the time of payment. Granting that the written contract is in force, the appellants cannot be heard to say that it changes the rate of interest fixed by the note; but as we have already shown, there is no such contract in force, and hence the terms of the original contract remain unchanged.

It would avail the appellants nothing if it were held that there is a valid contract binding them to pay ten per cent interest; their original contract already bound them to do that, so that there was no agreement on their part to do anything they were not already legally bound to do: *Shaw* v. *Rigby*, 84 Ind. 375; 43 Am. Rep. 96; *Gale* v. *Corey*, 112 Ind. 39.

Judgment affirmed.

NEGOTIABLE INSTRUMENTS — EXTENSION OF TIME, CONSIDERATION FOR. — A note usurious in character is a sufficient consideration to sustain a contract for the payment of another promissory note: *Kelley* v. *Gillespie*, 12 Iowa, 55; 79 Am. Dec. 516, and note.

A VOID EXTENSION OF TIME WILL NOT RELEASE A SURETY. — A surety on a promissory note is not discharged by a usurious agreement for extension of time: *Meiswinkle* v. *Jung*, 30 Wis. 361; 11 Am. Rep. 572; *Abel* v. *Alexander*, 45 Ind. 523; 15 Am. Rep. 270; *Irvine* v. *Adams*, 48 Wis. 468; 33 Am. Rep. 817; *Merriman* v. *Baker*, 121 Ind. 74; *contra*, *Kelley* v. *Gillespie*, 12 Iowa, 55; 79 Am. Dec. 516, and note; *Batavian Bank* v. *McDonald*, 77 Wis. 487; *Leverone* v. *Hildreth*, 80 Cal. 139. The obligation of a surety is not to be extended beyond what the terms of the contract fully import: *First Nat. Bank* v. *Gerke*, 68 Md. 449; 6 Am. St. Rep. 453, and note.

CONNER v. WOODFILL.

[126 INDIANA, 85.]

TRESPASS — SHEDDING WATER ON ADJOINING LAND. — One who, by means of a spout, sheds and throws the water from his building upon the land of an adjoining owner is guilty of trespass, and liable in damages therefor.

EASEMENT — SHEDDING WATER ON LAND OF ANOTHER. — One who, by means of a spout, throws water from his building on the land of an adjoining owner for more than twenty years without an assertion of a right so to do, and only by sufferance of such owner, does not acquire an easement, but remains a trespasser.

W. A. Moore and C. Shane, for the appellant.

M. D. Tackett and B. F. Bennett, for the appellees.

BERKSHIRE, C. J. This is an action to recover damages for an alleged injury to real estate.

The appellees have filed no brief, and except so far as we are informed by the brief of the appellant, we have no information as to the position assumed by the appellees in the trial court.

The court sustained a demurrer to the appellant's complaint, and being willing to abide thereby, he refused to amend, and the court rendered judgment against him for want of a sufficient complaint.

The only question presented by the assignment of error is as to the propriety of the ruling of the court sustaining the demurrer to the complaint.

The complaint alleges that the parties were, and are, adjoining lot-owners in the city of Greensburgh, their lots being of equal size, sixty by one hundred and twenty feet, and lying side by side; both lots front to the north, the appellant's being on the west. The appellant has occupied his lot as his place of residence, and the appellees have their church upon theirs.

The appellees erected their church in the year 1866; the size of the building is fifty by fifty feet, and its west wall is eight feet from the east line of the appellant's lot.

The rainfall upon the building is shedded, as near as may be, one half to the east and the other half to the west; at the southwest and northwest corners of the building are downspouts to receive and carry from the building the water which is shedded to the west side of said building; passing through these spouts to the ground, the water passes off the appellees' lot and on the lot of the appellant, to his injury, etc.

There has been no change in the conditions since the erection of the church, which was over twenty years before the commencement of this suit.

It is averred that the appellant at no time availed himself of the statute to prevent one land-holder from acquiring an easement over the real estate of another. But it is also averred that frequently during the time intervening from the date at which the church was erected and the institution of this action, the appellant complained frequently and often protested to the appellees because of the discharge of the water from their said building upon his lot, and that they as frequently promised and assured him that they would remove the cause leading to the injury of which he complained.

We think there can be no doubt but that the appellees were, in the beginning, and at any time within twenty years thereafter, liable to an action for the injuries complained of.

The appellees were trespassers whenever they shed the water from their building so as to throw it upon the appellant's lot: *Bellows* v. *Sackett*, 15 Barb. 96; *Weis* v. *City of Madison*, 75 Ind. 241; *Templeton* v. *Voshloe*, 72 Ind. 134; 37 Am. Rep. 150; *Lynch* v. *Mayor etc.*, 76 N. Y. 60; 32 Am. Rep. 271; *Miller* v. *Laubach*, 47 Pa. St. 154; 86 Am. Dec. 521; *Pettigrew* v. *Village of Evansville*, 25 Wis. 223; 3 Am. Rep. 50; *North Vernon* v. *Voegler*, 89 Ind. 77; *Seely* v. *Alden*, 61 Pa. St. 302; 100 Am. Dec. 642; *Adams* v. *Hastings etc. R. R. Co.*, 18 Minn. 260.

And they are still wrong-doers, unless by twenty years' adverse enjoyment they have acquired an easement.

The use which ripens into an easement is adverse to the land-holder, and continuous and uninterrupted for twenty years. The statute (section 4321) so provides.

It reads: "The right of way, air, light, or other easement from, in, upon, or over the land of another shall not be acquired by adverse use, unless such use shall have been continued uninterruptedly for twenty years." And so are all the authorities: *McCardle* v. *Barricklow*, 68 Ind. 356, and cases cited; *Parish* v. *Kaspare*, 109 Ind. 586.

In this case it is said: "An owner of land is not shorn of his right by merely permitting, as a favor, another to pass over his land. In order to establish a prescriptive right, something more than mere permissive user must be shown"; citing Bennett's Goddard on Easements, 134. It is further said:

"It is not necessary, to establish a prescriptive easement, that there should be color of title; but it is necessary that the use be under an assertion of right, and not simply a user under a naked license."

The appellees, by their demurrer, admit the allegations of the complaint to be true.

The allegations in the complaint rebut any assertion of right on the part of the appellees to flow the water shed from their building upon the appellant's lot, but it was continued merely by his sufferance.

We are of the opinion that the complaint is good, and that the court erred in sustaining the demurrer to it.

Judgment reversed, with costs.

TRESPASS. — WHO ARE TRESPASSERS, AND THEIR LIABILITY FOR DAMAGES: See extended note to *Kirkwood* v. *Miller*, 73 Am. Dec. 137–149.

CONTINUOUS EASEMENT is one which may be used and enjoyed without the act or intervention of man, as a spout discharging rain-water: *Bonelli* v. *Blakemore*, 66 Miss. 136. One cannot drain water upon the land of another because no special damage can be shown: *Chapel* v. *Smith*, 80 Mich. 100; *McGeorge* v. *Hoffman*, 133 Pa. St. 381. And if land was damaged he would be liable therefor: *Weddell* v. *Hapner*, 124 Ind. 315.

EASEMENT. — To maintain a prescriptive right to an easement, it must appear that the user commenced and continued under a claim of right, was peaceable, without interruption, open, notorious, and exclusive, and maintained with the knowledge of the owner of the servient estate: *Montgomery* v. *Locke*, 72 Cal. 75. To acquire an easement by prescription, it must be enjoyed during the entire time prescribed by the statute of limitations: *Tetel* v. *Bonnefoy*, 123 Ill. 653; 5 Am. St. Rep. 570.

WELLS *v.* BOWER.

[126 INDIANA, 115.]

EXECUTIONS — RATIFICATION OF EXECUTION ISSUED WITHOUT AUTHORITY. — A plaintiff has the right to control the issuing of execution upon a judgment in his favor; but if an execution is issued without his authority, and he ratifies such act, the execution becomes valid and binding as to purchasers under it in good faith.

JUDGMENTS — ASSIGNMENT OF — VALIDITY OF EXECUTION SALE. — Where the holder of a valid judgment which is a lien on real estate attempts to assign it, and the assignee afterwards takes out execution, and at the sale of the land thereunder becomes the purchaser, paying the full amount of the judgment with the full knowledge and consent of the assignor, third parties cannot question the validity of the assignment and subsequent proceedings on the ground that the assignment and notice of sale were insufficient.

JUDGMENTS — SALE ON EXECUTION AFTER EXPIRATION OF JUDGMENT LIEN. — The issuing and levy of execution during the lifetime of the judgment lien will not continue the lien beyond the time limited by statute. To preserve the priority acquired by the judgment, the sale must be made during the statutory period, and the purchaser at a sale made thereafter under an execution issued during the lifetime of the judgment lien takes title subject to all liens existing at the date of the levy of the execution.

W. K. Marshall and L. F. Branaman, for the appellant.

R. Applewhite and B. H. Burrell, for the appellees.

OLDS, J. This is an action brought by the appellees against the appellant to quiet the title to certain real estate. The question presented arises on the overruling of a demurrer by the appellant to the complaint. As appears by the averments of the complaint, one Thomas J. H. Bower was the owner of the real estate in controversy, situate in Jackson County. On the twenty-fifth day of April, 1876, one Josiah Cobbs recovered a judgment in the Jackson circuit court for the sum of ninety-two dollars and costs against said Thomas J. H. Bower and Simeon Stockdell. Afterwards, on the eleventh day of February, 1884, Cobbs sold and duly assigned the judgment to Daniel W. Bower. On the thirteenth day of April, 1886, the assignee of said judgment caused an execution to be issued on said judgment, and to be delivered to the sheriff of said county, and on the fifteenth day of April, 1886, the sheriff duly levied said execution on said real estate, and having first duly advertised the same, sold the same on the fifteenth day of May, 1886, to the appellees at and for the sum of $264.47, and the same not having been redeemed on the fifteenth day of May, 1887, the sheriff executed a deed for said real estate so sold to the appellees.

It is further averred in the complaint that on the twelfth day of December, 1877, the board of commissioners of said Jackson County recovered a judgment in the Jackson circuit court against said Thomas J. H. Bower and one Calvin B. Williams for the sum of $315 and costs; that on the ninth day of June, 1887, the members of the board of commissioners attempted to sell and assign said judgment to the appellant, James C. Wells, by an indorsement on said judgment, but that no notice was given of the time and place of the sale of said judgment, nor did the members of said board enter of record their action, nor did they assign said judgment as a board of commissioners; that after said pretended sale the said ap-

pellant caused an execution to issue on said judgment, and to be delivered to the sheriff of said county, which execution said sheriff duly levied upon said real estate, and having duly advertised the same, he sold the same on the sixth day of August, 1887, to the appellant for the sum of $310. It is averred that at said sale the appellees gave notice to all bidders that said proposed sale was irregular and would be void.

Two questions are presented and discussed by counsel; and stating them in the order discussed, they are,—1. Whether the sale on the execution issued on the Cobbs judgment relates back to the date of the rendition of the judgment so that the purchaser took title by virtue of the judgment lien, or whether, ten years having expired prior to the sale on the execution, the purchaser took title subject to all liens upon the land at the date of the levy of the execution; 2. Did the appellee derive any rights or title under the sale on the judgment rendered in favor of the board of commissioners?

We may properly first consider the question last stated, since, if the appellant derived no title or rights by virtue of the assignment to him of the judgment in favor of the board of commissioners, and the sale thereafter on execution issued on said judgment, then title may be quieted against him, and it is unnecessary to consider the question as to whether the appellees' title relates to the date of the levy or the date of the judgment.

It is contended by counsel for the appellees that as the statute provides that "the board of commissioners shall not be authorized to sell any county property, either real or personal, except at public auction, after advertising said property for sale sixty days," etc. (Rev. Stats. 1881, sec. 4248), the attempted sale and transfer are absolutely void, and that the execution was issued without authority, and hence the sale was also void.

The facts as alleged in the complaint show that the board of commissioners recovered a valid judgment against the owner of the real estate in the circuit court of the county wherein it was situated; that the board of commissioners attempted to sell and assign the same to the appellant. It does not appear but that the appellant paid to the board the full amount of the judgment; that an execution was duly issued upon the judgment and delivered to the sheriff of the county, and he levied upon and advertised and sold the land, and the appellant became the purchaser.

The appellees base their contention that the sale was void and passed no title to the appellant, on the grounds that the judgment is personal property, and that the board of commissioners had no authority to sell without first having given notice. We do not concede that it is necessary to give notice of such sale; but if it be true that the commissioners could only sell and transfer the legal title to the judgment by having first given notice in accordance with the statute, yet it does not, by any means, follow that the execution and sale thereon were void and passed no title.

As a rule, judgment plaintiffs have the right to control the issuing of executions upon judgments in their favor; but if execution be issued by the clerk without the authority of the judgment plaintiff, and if he ratify it, the execution becomes as valid and binding as if issued by his authority.

In 1 Freeman on Executions, 2d ed., sec. 21, it is said: "Doubtless the ratification may be inferred from very slight circumstances, when the knowledge of the existence of the writ is brought home to plaintiff. Nevertheless, it may happen, without any fault or neglect on the part of the plaintiff, that the writ is issued and executed without his knowledge, and to his prejudice. In such case, either he or the purchaser at the execution sale must suffer loss; and so far as the question has been considered, it has been held, and perhaps wisely, that the loss, if any, falls on him, and that the purchaser, if he acted in good faith, takes title, although the sale was without plaintiff's knowledge, and realized a sum less than the value of the property, and insufficient to satisfy the writ."

In the case of *Johnson* v. *Murray*, 112 Ind. 154, 2 Am. St. Rep. 174, it is held that the improvident issuing of a writ does not render it void, and the court says: "If the writ is not void, it must be attacked directly, and not collaterally; at all events, it must be attacked prior to the acquisition of title by sale made under it." In the same case the court further says: "The true and just rule is that recognized by the text-writers and by our decisions, and that is, where there is a mere improvident issue of the writ, there must be a motion to quash it, or some such direct attack, and that a suit to quiet title after the sale has been perfected will be unavailing." But, indeed, in this case it is not so much as shown that the writ was improvidently issued. It is not shown to have been issued without the consent of the commissioners. It is shown that they made an attempt to assign the judgment, which, if

legally done, would have given the assignee the right to have controlled the writ. Neither the board of commissioners nor any person with authority from them is questioning the legality of the writ or sale. The question as presented by the facts shows that the board of commissioners had a valid judgment, which was a lien upon the real estate of Thomas J. H. Bower, and the commissioners attempted to assign it, and an execution was issued upon it, and the real estate of the judgment defendant sold to satisfy the judgment, and the appellant became the purchaser for about the full amount of the judgment, and the board of commissioners are making no question about the improvident issuing of the execution, or the legality of the sale, and for aught that appears they had full knowledge of its issuance and of the sale, and have received full payment of their judgment. Certainly, under these circumstances, the appellees are in no condition to contest the validity of the sale, and the appellant derived title to the land by such sale and purchase. It remains, then, to determine the effect of the sale on the execution on the Cobbs judgment after the expiration of ten years from the rendition thereof. By section 608, Revised Statutes of 1881, it is provided that "all final judgments in the supreme and circuit courts for the recovery of money or costs shall be a lien upon real estate and chattels real, liable to execution in the county where judgment is rendered, for the space of ten years after the rendition thereof, and no longer, exclusive of the time during which the party may be restrained from proceeding thereon by any appeal or injunction, or by the death of the defendant, or by agreement of the parties entered of record."

This identical question was considered and passed upon in the case of *Jenkins* v. *Newman*, 122 Ind. 99. In that case a judgment was rendered on March 4, 1871, and execution issued on the judgment March 3, 1881. In speaking of the sale made on such execution, at pages 107, 108, it is said: "The judgment rendered in favor of Ferris by virtue of the statute was made a lien on the land of the judgment debtor, Alexander Jenkins, for the period of ten years from the date of the rendition of such judgment. At the expiration of ten years that lien expired, and cannot be extended by the issuing and levy of an execution, and the judgment lien expired before the sale made by virtue of the execution issued upon the judgment; so that no title passed by such sale by reason of any judgment lien."

This, we think, must be the correct construction to be given to this statute. It expressly provides that the judgment shall be a lien for ten years, and no longer, except in certain cases, and none of the exceptions are applicable in this case.

If a party desires to derive the benefit of his judgment lien he must enforce it during its lifetime, and if he fails to do so he derives no benefit of the lien; and unless the judgment plaintiff's right to enforce his lien is suspended on account of some of the reasons stated in the section, the lien expires at the end of ten years, and he obtains no title by virtue of the lien through a sale made after that date. The conclusion we have reached is in harmony with authority: See Freeman on Judgments, 3d ed., sec. 392. It is said: "The lien of judgments, being generally created and limited by statutes prescribing the period of its duration, is, for the most part, kept strictly within the bounds thus assigned to it. The object of a *scire facias* is not to extend or to continue the lien, but to enable plaintiff to make it available by execution. Therefore if the law provide that judgment liens shall continue for a number of years, but that execution can issue only within a shorter period, it may be necessary for the plaintiff to revive his judgment so as to obtain execution after the lapse of this shorter period, and before the expiration of the lien. In case he proceeds to revive his judgment by *scire facias*, this will not prolong the lien beyond the time prescribed by statute."

The same author, at section 394 a, says: "The time during which judgments have the force of liens on the lands of judgment debtors is usually prescribed by statute. In many instances, executions have been taken out and levies made within the time prescribed for the continuance of the lien, but so late that the sale did not take place until after the lapse of such time. In regard to such cases, so far as our observation has extended, it has, except in the state of Missouri, been uniformly held that the execution and levy did not continue the lien, and that to preserve the priority acquired by the judgment the sale must be made during the statutory period. The title acquired at such a sale is therefore precisely the same as though the judgment had never been regarded as a lien": *Bagley* v. *Ward*, 37 Cal. 121; 99 Am. Dec. 256; *Isaac* v. *Swift*, 10 Cal. 71; 70 Am. Dec. 698; *Roe* v. *Swart*, 5 Cow. 294; *Little* v. *Harvey*, 9 Wend. 158; *Tufts* v. *Tufts*, 18 Wend. 621; *Davis* v. *Ehrman*, 20 Pa. St. 256; *James* v. *Wortham*, 88 Ill. 69; *Parsour* v. *Rhyne*, 82 N. C. 149.

The sale upon the execution issued on the judgment in favor of the board of commissioners, having been made within the lifetime of this lien, related back to the date of judgment, and the sale on the execution issued on the Cobbs judgment was subject to the lien of the judgment in favor of the board.

It follows from the conclusion we have reached that the court erred in overruling the demurrer to the complaint.

Judgment reversed, at costs of appellees, with instructions to sustain the demurrer to the complaint.

JUDGMENT — ISSUANCE OF EXECUTION THEREUNDER. — Execution under a judgment in favor of a plaintiff is issued and made returnable at his option: *Blodgett* v. *Perry*, 97 Mo. 263; 10 Am. St. Rep. 307. A defect in issuing an execution may be cured: *Hall* v. *Lackmond*, 50 Ark. 113; 7 Am. St. Rep. 84, and note.

JUDGMENT — ASSIGNMENT OF. — An action to set aside a judgment may be maintained against an assignee: *Magin* v. *Lamb*, 43 Minn. 80; 19 Am. St. Rep. 216. An assent by an heir to a sale under a void judgment passes an equitable title as to his share: *Salmond* v. *Price*, 13 Ohio, 368; 42 Am. Dec. 204. As to the assignment of judgments and the validity of executions thereunder, see extended note to *Dugas* v. *Mathews*, 54 Am. Dec. 366–369.

JUDGMENT LIEN — STATUTORY PERIOD. — The lien of a judgment ceases with the judgment's life: *Paxton* v. *Rich*, 85 Va. 378.

ADAMS *v.* BICKNELL.

[126 INDIANA, 210.]

MALICIOUS PROSECUTION — CONVICTION AND ACQUITTAL AS AFFECTING RIGHT OF ACTION — SUFFICIENCY OF COMPLAINT. — A complaint in malicious prosecution, alleging a conviction before a justice of the peace and an acquittal on appeal, and that the prosecution was malicious and without probable cause, but containing no allegation that the conviction was procured by perjury or subornation of perjury on the part of defendant, or by fraud or collusion, or any improper motive on the part of the justice, is insufficient on demurrer. In such case the conviction is conclusive evidence of probable cause, and exonerates the defendant from liability.

MALICIOUS PROSECUTION — CONVICTION AS PROOF OF PROBABLE CAUSE. — In an action for malicious prosecution, founded upon a conviction below and an acquittal on appeal, the conviction, in the absence of fraud, is conclusive evidence of probable cause, and relieves the defendant from liability.

MALICIOUS PROSECUTION — RELYING ON ADVICE OF COUNSEL AS PROBABLE CAUSE. — In malicious prosecution the burden of proof is upon the plaintiff to prove want of probable cause, and where the defendant has laid all the facts before counsel, and has acted in good faith upon the advice given, this exonerates him from liability.

MALICIOUS PROSECUTION — CONVICTION AS PROOF OF PROBABLE CAUSE. — Where a court of competent jurisdiction to try an offense has acted upon all the facts, and has found the defendant guilty, this constitutes probable cause, and conclusively exonerates the prosecuting witness from liability in an action for malicious prosecution, although the conviction has been appealed from and an acquittal had.

J. C. Chaney and W. S. Maple, for the appellant.

W. C. Hultz and O. B. Harris, for the appellee.

OLDS, C. J. This is an action for a malicious prosecution. The complaint alleges that in March, 1887, the appellee instituted before a justice of the peace a prosecution against the appellant, charging the appellant with having obstructed a public highway in Sullivan County, Indiana.

It appears from the averments of the complaint that the appellant was convicted before the justice of the peace, and he took an appeal to the circuit court, and was acquitted of the charge.

The complaint contains proper averments that the prosecution was malicious and without probable cause, but there are no averments that the conviction before the justice was procured by perjury or subornation of perjury on the part of the appellee, or by fraud or collusion, or any improper motives on the part of the justice.

A demurrer was sustained to the complaint, exceptions reserved to the ruling, and the ruling of the circuit court in sustaining the demurrer is assigned as error.

The sole question presented is as to whether the complaint is rendered defective on account of its showing that there was a conviction of the appellant before the justice of the peace.

It is contended by counsel for appellee that the fact that the appellant was convicted by the justice, in the absence of averments that such conviction was procured by perjury or subornation of perjury on the part of the appellee, or showing that it was procured by fraud or collusion on his part, rebuts the other averments of malice and want of probable cause, and is conclusive evidence of probable cause, and exonerates the appellee from liability.

On the other hand, it is contended by counsel for appellant that the appeal operated to vacate the judgment before the justice, and the cause came up in the circuit court for a trial *de novo;* that it is the same as if a new trial had been granted by the justice, and hence is not conclusive evidence that probable cause existed for instituting the prosecution.

The decisions of the courts are not uniform upon the question presented, but we think the great weight of authority is to the effect that the judgment of conviction of the justice's court, though appealed from and an acquittal had in the circuit court, is, in the absence of fraud, conclusive of probable cause.

Cooley on Torts, 2d ed., page 185, states the law to be: "If the defendant is convicted in the first instance, and appeals, and is acquitted in the appellate court, the conviction below is conclusive of probable cause."

Stephen, in his work on the law relating to actions for malicious prosecution, page 101, says: "It seems probable that the reversal on appeal of a conviction is not a termination favorable to the person convicted upon which he can found an action for malicious prosecution. *Reynolds* v. *Kennedy*, 1 Wils. 232 (1748), which has frequently been quoted as an authority, was an appeal from the court of king's bench in Ireland. The declaration was for seizing the plaintiff's brandy, and 'falsely and maliciously' exhibiting an information against him before the subcommissioners of excise for not having paid duty upon it. It alleged that the subcommissioners condemned the brandy, and that the commissioners of appeal 'most justly reversed the judgment of the subcommissioners.' It was held that as to the information before the subcommissioners, the declaration showed a foundation for the prosecution, and that as to the appeal 'we cannot infer from the judgment of reversal of the commissioners of appeal, that the defendant, the prosecutor, was guilty of any malice.'"

In *Griffis* v. *Sellers*, 2 Dev. & B. 492, 31 Am. Dec. 422, a well-reasoned case, it is held that where there were a trial and conviction in the county court, and an appeal taken to the superior court, where the defendant was acquitted, it was conclusive of probable cause, and that the defendant in such case could not maintain an action for malicious prosecution, and the declaration was held bad for this reason.

In the case of *Clements* v. *Odorless etc. Co.*, 67 Md. 476, 1 Am. St. Rep. 409, in an action for malicious prosecution, where there had been a judgment in favor of the defendant, in the cause upon which the prosecution was based, which judgment had been reversed, said: "It was the deliberate judgment of a court of competent jurisdiction that there was not only a probable cause for filing the bill for injunction, but that the appellee was entitled to the relief prayed. A judg-

ment thus rendered ought to be considered conclusive as to the question of probable cause, although it was reversed on appeal by the supreme court; otherwise, in every case of reversal, an action would lie for the institution of the original suit."

Whitney v. *Peckham*, 15 Mass. 243, is a case directly in point. The plaintiff in that case was arrested for an alleged assault and battery, and tried and convicted before a justice. On appeal to the circuit court of common pleas, he was acquitted. The supreme court held that the conviction before the justice, he having jurisdiction of the subject-matter, was conclusive evidence that there was probable cause: *Parker* v. *Huntington*, 2 Gray, 124; *Parker* v. *Farley*, 10 Cush. 279.

In *Bitting* v. *Ten Eyck*, 82 Ind. 421, 42 Am. Rep. 505, it is said by this court: "The conviction of the plaintiff is always evidence of probable cause, unless it was obtained chiefly or wholly by the false testimony of the defendant; generally it is conclusive evidence of probable cause." It is further said: "And it has been held sufficient evidence of probable cause to show that the plaintiff was convicted of the offense before a justice of the peace who had jurisdiction, although he was afterwards acquitted on an appeal."

These decisions are in accordance with other holdings in regard to the law governing malicious prosecutions.

The burden of proof rests upon the plaintiff, in such cases, to prove the want of probable cause; and in this class of cases it has been held that where one lays all the facts before counsel, and acts in good faith upon an opinion given, it exonerates him from liability.

In Cooley on Torts, page 183, Mr. Cooley says: "It may perhaps turn out that the complainant, instead of relying upon his own judgment, has taken the advice of counsel learned in the law, and acted upon that. This should be safer and more reliable than his own judgment, not only because it is the advice of one who can view the facts calmly and dispassionately, but because he is capable of judging of the facts in their legal bearings. A prudent man is therefore expected to take such advice; and when he does so, and places all the facts before his counsel, and acts upon his opinion, proof of the fact makes out a case of probable cause, provided the disclosure appears to have been full and fair, and not to have withheld any of the material facts"; and this doctrine is adhered to by this court, and is distinctly and clearly stated

in the case of *Paddock* v. *Watts*, 116 Ind. 146, 151, 9 Am. St. Rep. 832, as follows: "Where one lays all the facts before counsel, and acts in good faith upon an opinion given, he is not liable to an action, even though it turn out that he was mistaken. But in order that he may obtain immunity, he must have made a full and fair statement of all the facts known to him."

When the question arises upon the evidence, it is usually a controverted fact as to whether the defendant did make a full and fair statement of all the facts known to him, and acted in good faith on the opinion given; but should it affirmatively appear in a complaint that the defendant did make a full and fair statement to counsel, and in good faith acted upon an opinion given, it would seem that it would show a case of probable cause on the part of the defendant, and render the complaint insufficient to withstand a demurrer; or if such a state of facts should be pleaded as a defense, it would be good to withstand a demurrer.

If it be a good defense, then it destroys the plaintiff's right of action when it is fully stated in his complaint.

One of the reasons upon which this rule is based is, that when the prosecuting witness acts upon facts which are of such a character that when they are stated to a calm and dispassionate person, capable of judging, they lead him to conclude the person charged is guilty, they are such as to make a case of probable cause on which the prosecuting witness has the right to act; so in relation to a case like the one at bar, if the facts are such as lead a court of competent jurisdiction to try the offense, to act upon them and find the defendant guilty, it makes out a case of probable cause, and conclusively exonerates the prosecuting witness from liability, although an appeal may be taken and an acquittal had in the appellate court.

As said in *Paddock* v. *Watts*, 116 Ind. 146, 151, 9 Am. St. Rep. 832, "Where one lays all the facts before counsel, and acts in good faith upon an opinion given, he is not liable to an action, even though it turn out that he was mistaken."

So it may be said in a case where the judgment of conviction is appealed from and an acquittal had. If the prosecuting witness presented the facts to one court, competent to try the cause, and the court found the defendant guilty, it makes out a case of probable cause, and exonerates him

from liability, though that court erred in its judgment. This is undoubtedly the true rule.

It is the duty of citizens when they are in possession of facts which, when fully and fairly presented to a calm and dispassionate lawyer, capable of determining whether such facts constitute a crime such as should be prosecuted and punished, or sufficient when presented to a court having jurisdiction to try the offense, to lead the court to act upon them, and find the defendant guilty, to take legal steps for the punishment of such offenders; and they should, when they act in good faith upon such facts, be exonerated from any liability in an action for malicious prosecution.

If it was averred or shown by the complaint in this case that such conviction had been procured by perjury or subornation of perjury on the part of the appellee, or by any fraud or collusion on his part, it would present a different question; but it contains no such averments.

The conclusion we have reached being in harmony with the ruling of the circuit court, the judgment must be affirmed.

Judgment affirmed, with costs.

MALICIOUS PROSECUTION — SUFFICIENCY OF COMPLAINT. — A plain and clear statement of the facts constituting the wrong is sufficient: *Antcliff* v. *June*, 81 Mich. 477; 21 Am. St. Rep. 533; and note; *Cottrell* v. *Cottrell*, 126 Ind. 181.

MALICIOUS PROSECUTION — CONVICTION AS A PROOF OF PROBABLE CAUSE. — An acquittal does not establish a want of probable cause: *Boeger* v. *Langenberg*, 97 Mo. 390; 10 Am. St. Rep. 322, and note; *Brown* v. *Randall*, 36 Conn. 56; 4 Am. Rep. 35; *Jones* v. *Finch*, 84 Va. 204. Where there is a failure to establish want of probable cause, a nonsuit is properly granted: *Fenstermaker* v. *Page*, 20 Nev. 290.

MALICIOUS PROSECUTION — PROBABLE CAUSE — ACTING UNDER ADVICE OF COUNSEL. — The presumption of malice may be rebutted by showing that prosecutor acted under advice of counsel: *Smith* v. *Walter*, 125 Pa. St. 453; *Huntington* v. *Gault*, 81 Mich. 144; *Hazzard* v. *Flury*, 120 N. Y. 223; *Cooney* v. *Chase*, 81 Mich. 203. But if full disclosure was not made to the attorney the fact that the action was brought on his advice will not be a shield to an action for malicious prosecution: *Cointement* v. *Cropper*, 41 La. Ann. 303; and the same is true if false statements were made to the attorney: *Peterson* v. *Toner*, 80 Mich. 350.

LOUISVILLE, NEW ALBANY, AND CHICAGO RAILWAY COMPANY *v.* NITSCHE.

[125 INDIANA, 229.]

RAILROADS — NEGLIGENCE — SETTING FIRE ON RIGHT OF WAY. — Where a railroad company, whose right of way as well as surrounding lands is composed of one vast bed of turf or peat, intentionally sets fire to such right of way in a season of great drought, it is guilty of positive tort, and not of mere passive negligence, and is liable for all loss resulting to adjoining owners or others to whose land the fire is communicated by an ordinary wind.

RAILROADS — NEGLIGENCE — SETTING FIRE ON RIGHT OF WAY. — A railroad company may remove combustible material from its right of way, and while it may ordinarily employ fire for that purpose without committing negligence, still, when the use of fire greatly imperils adjoining property, it is a positive wrong to employ fire for such purpose, for which the company must respond in damages in case of loss.

G. W. Friedley and E. C. Field, for the appellant.

J. Kopelke, for the appellee.

ELLIOTT, J. Gathered and grouped in a form sufficiently full and clear to exhibit the questions of law which arise in this case, the facts as they appear in the special finding may be thus stated: The appellee is the owner of lands used for ordinary farming and grazing purposes, adjoining the appellant's railroad. On the nineteenth day of July, 1887, the section-hands of the appellant, by order of its road-master, set fire to grass, weeds, and other combustible materials on the appellant's right of way, a short distance from the appellee's land, and burned off a great part of the space occupied by the track. The object of the section-men was to remove from the right of way all combustible materials. At the time the fire was set out it was very dry, no rain having fallen for more than four weeks. The section-men extinguished all the blaze and flame caused by the fire set out by them, but fire remained in some pieces of turf which had been ignited, and although there was no flame, the fire was still alive and smoldering. These pieces of burning turf were cast back upon the space which had been burned over. The appellant's right of way extended over beds of turf, or peat, and the same material formed the surface of the body of adjoining lands, and also of the appellee's land, which was adjacent to the right of way of the appellant. Turf, or peat, when dry, will ignite, and burn to the depth at which it ceases to be dry. On the twenty-second day of July, 1887, the wind shifted

to the northeast, and blew fresh, but not unusually strong for the locality. The fire smoldering in the pieces of turf cast back upon the track was kindled into a flame, and, passing from the right of way, communicated fire to the land owned by Hawkinson, burned there for a time, but finally all the fire that was visible was fought out and extinguished by persons residing in the neighborhood. The fire had, however, communicated with the turf on Hawkinson's farm, where it remained dormant until the morning of the twenty-third day of the month named; on that day it broke out and spread over the land of Schaffer. For the second time neighbors extinguished such flame as was visible, but the turf still held fire, and burned slowly. On the twenty-fourth day of the same month the wind shifted to the south, and the fire from Schaffer's land was communicated to the turf, or peat, on the appellee's farm. For the third time such fire as could be seen or reached was extinguished by persons residing in the neighborhood, assisted by the employees of the appellant; but still the fire remained in the turf, smoldering, but not extinguished. On the second day of August the wind increased, but it did not blow stronger than is usual in the locality, and again the fire, smoldering in the turf on appellee's farm, broke out. It ran over ten acres, and caused the appellee serious loss. "By reason of the dryness of the season and the character of the soil," says the trial court in its finding, "it was negligence on the part of the defendant to set fire to and burn off the right of way at the place and time where the same was so burned."

An essential and ruling element of this case is, that it was a tortious act to set out the fire which caused the plaintiff's injury. It was something more than culpable negligence to start a fire on a bed of turf, or peat, in a season of great drought, when for weeks no rain had fallen, and the ground was parched and dry. The act of the defendant in setting out a fire at such a place and under such conditions was a positive wrong; for the law forbids that one person should put the property of another in jeopardy by such an act. In degree, only, is there a difference between such a case as this and one in which a person kindles a fire near a train of gunpowder leading to a magazine filled with explosive substances. In essence, the case is the same as that of one who builds a fire upon materials that will ignite and continue burning, in a place where all surrounding materials are of the

same combustible character. If a person should kindle a fire in a great heap of inflammable paper, surrounded on every side by other like heaps, with the line of communication between them direct and unbroken, no one, we venture to say, would hesitate to declare that he by whom the fire was kindled was guilty of a positive tort, and not of mere passive negligence.

A railroad company has a right to remove combustible material from its right of way, and ordinarily it may not be negligence to employ fire for that purpose; but where the conditions are such as to put in great peril adjacent property, fire cannot be rightfully used for such a purpose. Fire is a necessary agent, in common use in life, and from its employment, under ordinary conditions, negligence or wrong is not necessarily inferable; but it may be so used as to make the person using it guilty of a tortious act. The doctrine we assert was declared in the early years of the common law: *Smith* v. *Frampton*, 2 Salk. 644; *Tubervil* v. *Stamp*, 1 Salk. 13; *Anonymous*, Cro. Eliz. 10.

The rule has continued in unbroken force through all the ages of the jurisprudence of the English-speaking nations: *Catron* v. *Nichols*, 81 Mo. 80; 51 Am. Rep. 222; *Miller* v. *Martin*,16 Mo. 508; 57 Am. Dec. 242; *Clark* v. *Foot*, 8 Johns. 421; *Barnard* v. *Poor*, 21 Pick. 378; *Hanlon* v. *Ingram*, 3 Iowa, 81; *Fahn* v. *Reichart*, 8 Wis. 255; 76 Am. Dec. 237; *Filliter* v. *Phippard*, 11 Q. B. 347; *McKenzie* v. *McLeod*, 10 Bing. 385; *Clsland* v. *Thornton*, 43 Cal. 437; *Collins* v. *Groseclose*, 40 Ind. 414. A lawful act may be done in such a mode or under such circumstances as to make it wrongful, and where fire is used in an improper manner, or under circumstances such as inexcusably imperil surrounding or adjacent property, the person so using it is a wrong-doer: *Gagg* v. *Vetter*, 41 Ind. 228; 13 Am. Rep. 322; *Freemantle* v. *London etc. R'y Co.*, 2 Fost. & F. 337; *Aldridge* v. *Great Western etc. R'y Co.*, 3 Man. & G. 515; *Vaughan* v. *Menlove*, 3 Bing. N. C. 468; *Crogate* v. *Morris*, Brownl. 197; *Higgins* v. *Dewey*, 107 Mass. 494; 9 Am. Rep. 63. In a series of cases our court has held that railroad companies are not liable for setting out fire on their own right of way, but are liable for negligently suffering it to escape and injure adjacent property: *Pittsburgh etc. R'y Co.* v. *Hixon*, 79 Ind. 111, and cases cited; *Pittsburgh etc. R'y Co.* v. *Jones*, 86 Ind. 496; 44 Am. Rep. 334; *Brinkman* v. *Bender*, 92 Ind. 234; *Louisville etc. R'y Co.* v. *Ehlert*, 87 Ind. 339; *Indiana*

etc. R'y Co. v. *Adamson*, 90 Ind. 60; *Indiana etc. R'y Co.* v. *McBroom*, 91 Ind. 111; *Wabash etc. R'y Co.* v. *Johnson*, 96 Ind. 40; *Pittsburgh etc. R'y Co.* v. *Hixon*, 110 Ind. 225. Within the principles established by these authorities, the person whose land was first reached by the fire would undoubtedly be entitled to recover; for the use of fire, under the circumstances existing at the time the fire was set out by the appellant, was wrongful, and the conditions were such as to make it reasonably certain that it would leave the appellant's right of way and follow the continuous beds of peat, or turf, upon which the track was laid, and which extended on every side of it, covering many acres. That the fire would escape from the right of way was so probable that the appellant must be held responsible for what did actually occur; for all persons are required to foresee and provide against the probable consequences of their acts. Unusual and improbable results are not to be anticipated, but usual or probable ones must be: *Billman* v. *Indianapolis etc. R. R. Co.*, 76 Ind. 166; 40 Am. Dec. 230; *Dunlap* v. *Wagner*, 85 Ind. 529; 44 Am. Rep. 42; *Wabash etc. R'y Co.* v. *Locke*, 112 Ind. 404; 2 Am. St. Rep. 193; *Louisville etc. R'y Co.* v. *Wood*, 113 Ind. 544, 556, and cases cited; *Clore* v. *McIntire*, 120 Ind. 262, 265; *Cincinnati etc. R. R. Co.* v. *Cooper*, 120 Ind. 469, 472; 16 Am. St. Rep. 334; *Terre Haute etc. R. R. Co.* v. *Clem*, 123 Ind. 15; 18 Am. St. Rep. 303; *Lane* v. *Atlantic Works*, 111 Mass. 136; *Hill* v. *Winsor*, 118 Mass. 251.

The only difficulty which this case presents grows out of the fact that the fire crossed the land of Hawkinson and of Schaffer before reaching that of the appellee; but the difficulty will be found, upon scrunity and analysis, to be apparent rather than real. Its apparel of seeming strength drops when the tests of reason and authority are applied, for neither upon principle nor authority can it be justly concluded that the injury was so remote as to defeat a right of recovery. As has been shown, the act of setting out a fire at such a season, and on an inflammable and continuous bed of peat, was a positive wrong and not mere passive negligence, so that the case falls within the rule declared in the famous "Squib case," which our own and other courts have so often and so strongly approved: *Scott* v. *Shepherd*, 2 W. Black. 892; *Billman* v. *Indianapolis etc. R. R. Co.*, 76 Ind. 166; 40 Am. Dec. 230; *Dunlap* v. *Wagner*, 85 Ind. 529; 44 Am. Rep. 42; *Terre Haute etc. R. R. Co.* v. *Buck*, 96 Ind. 346; 49 Am. Rep. 168; *Louisville etc. R'y Co.* v. *Falvey*,

104 Ind. 409; *Indianapolis etc. R'y Co.* v. *Pitzer*, 109 Ind. 179 (188); 58 Am. Rep. 387; *Ohio etc. R. R. Co.* v. *Hecht*, 115 Ind. 443, and cases cited; *Louisville etc. R'y Co.* v. *Snyder*, 117 Ind. 435; 10 Am. St. Rep. 60; *Denver etc. R'y Co.* v. *Harris*, 122 U. S. 597; *Lake Shore etc. R'y Co.* v. *Rosenzweig*, 113 Pa. St. 519; Addison on Torts, 42; Cooley on Torts, 70; Bishop on Noncontract Law, sec. 45; 2 Shearman and Redfield on Negligence, 4th ed., sec. 742. The wrong of the appellant put in motion the destructive agency, and the result is directly attributable to that wrong. In this instance, cause and effect are interlinked; there is no break; the chain is perfect and complete. The line of connection is as continuous and almost as closely woven into unity as the beds of peat which the railroad traverses, and which lie in one vast body along the right of way. Firing one part of such a body of inflammable material when it was parched by the long drought was, in legal contemplation, firing it all, for the spread of the fire was so probable that it was the duty of the appellant to foresee the result and not set out the fire. If a man should set fire to a rope saturated with inflammable oil, leading from house to house, and the fire, following the rope, should destroy a third house, we suppose it to be perfectly clear that he would be liable to the owner of that house; and what is true of the imaginary case is true of the actual one, for the line of causation is even more complete and perfect in the latter than in the former. We discriminate this case from the case of *Pennsylvania Co.* v. *Whitlock*, 99 Ind. 16; 50 Am. Rep. 71. There is solid reason for discriminating between the two cases. In the one there was mere passive negligence, in the other a positive wrong. There is also another element of difference, for the case referred to proceeds upon the theory that there was an intervening agency and a break in the line of causation, while here no such theory can be framed without violence to the facts, since the fire followed the continuous inflammable bed of peat upon which it was ignited by the appellant. It must, indeed, be owned that the case cited carries the doctrine to the utmost verge. The doctrine cannot, at all events, be extended, for even limiting it to the facts of the particular instance then before the court, the decision is in conflict with the decisions of the supreme court of the United States, with those of almost all of the state courts, and it is at variance with the views of the standard text-writers: *Milwaukee etc. R'y Co.* v. *Kellogg*, 94 U. S. 469; Shearman and Redfield on Negli-

gence, 4th ed., sec. 666, and notes; Cooley on Torts, 96, and note; Bishop on Non-contract Law, sec. 45; 8 Am. & Eng. Ency. of Law, 11, and cases cited.

It is difficult, if not impossible, to find a substantial reason for holding that an ordinary wind is an independent intervening agency; for what occurs in the usual course of nature, and is not abnormal or extraordinary, cannot be regarded as an independent agency. We think it very clear that if a man should erect walls too weak to withstand the force of ordinary winds, and they should fall upon and crush an adjoining building, he could not defeat the claim of the owner of the ruined building upon the ground that the walls fell before an ordinary wind. Between the supposed case and the real one before us, no difference in principle can be discerned by the keenest vision. Extraordinary winds may justly be regarded as independent intervening agencies; but not so winds which are usual, and prevail without disturbing the normal condition of nature. One who is himself without fault has, in justice and common fairness, a right to recover from one who has caused him loss by a tortious act, although an ordinary natural occurrence entered into the chain of events which culminated in the loss. It is in truth impossible to conceive a case wherein loss from fire can happen wholly independent of natural causes. Fire will not burn without air, and yet no one will be bold enough to assert that because this natural agency enters into every conflagration, therefore the wrong-doer is absolved from responsibility.

It is very seldom that any case arises in which some break between cause and effect is not discernible upon rigid scrutiny and by captious refinement; but the law is a practical science, and repudiates subtle refinements and speculative inquiries. It will not sacrifice substantial rights to such impracticable processes, but will reject them to make way for practical justice. Recondite discussions of efficient cause, plurality of causes, and kindred topics, are for the metaphysician and the speculative philosopher, not the practical lawyer or judge. In the ably reasoned opinion pronounced in the case of *Milwaukee etc. R. R. Co.* v. *Kellogg*, 94 U. S. 469, the supreme court of the United States unanimously declared that "in a succession of dependent events an interval may always be seen by an acute mind between a cause and its effect, though it may be so imperceptible as to be overlooked by a common mind. Thus if a building be set on fire by negligence, and an adjoin-

ing building be destroyed without any negligence of the occupants of the first, no one would doubt that the destruction of the second was due to the negligence that caused the burning of the first. Yet, in truth, in a very legitimate sense, the immediate cause of the burning of the second was the burning of the first. The same might be said of the burning of the furniture in the first. Such refinements are too minute for rules of social conduct. In the nature of things, there is in every transaction a succession of events, more or less dependent upon those preceding, and it is the province of a jury to look at this succession of events or facts, and ascertain whether they are naturally and probably connected with each other by a continuous sequence, or are dissevered by new and independent agencies; and this must be determined in view of the circumstances existing at the time." Discussing the same general principle in another case, that high tribunal said: "In the sense of an efficient cause, *causa causans*, this is no doubt strictly true; but that is not the sense in which the law uses the term in this connection. The question is, Was it *causa sine quo non*, — a cause which, if it had not existed, the injury would not have taken place, — an occasional cause? and that is a question of fact, unless the causal connection is evidently not proximate": *Hayes* v. *Michigan Central R. R. Co.*, 111 U. S. 228.

In the case of *Ætna Ins. Co.* v. *Boon*, 95 U. S. 117, the court said: "The question is not what cause was nearest in time or place to the catastrophe. This is not the meaning of the maxim, *Causa proxima, non remota spectatur.*" In the same case the court quoted with approval from the case of *Brady* v. *Northwestern Ins. Co.*, 11 Mich. 425, the following statement of the law: "That which is the actual cause of the loss, whether operating directly or by putting intervening agencies — the operation of which could be reasonably avoided — in motion, by which the loss is produced, is the cause to which such loss shall be attributed."

In almost every branch of the law may be found cases, ancient and modern, asserting the general doctrine outlined in the decisions from which we have quoted. Many of the cases we have already cited assert this general doctrine, and to them may be added *Omslaer* v. *Philadelphia Co.*, 31 Fed. Rep. 354; *Lund* v. *Tyngsboro*, 11 Cush. 563; *Louisiana etc. Ins. Co.* v. *Tweed*, 7 Wall. 44; *Butler* v. *Wildman*, 3 Barn. & Adol, 398; *Barton* v. *Home Ins. Co.*, 42 Mo. 156; 97 Am. Dec. 329; *Marcy*

v. *Merchants' Mut. Ins. Co.*, 19 La. Ann. 388; *Ring* v. *City of Cohoes*, 77 N. Y. 83; 33 Am. Rep. 574; *Ehrgott* v. *Mayor etc.*, 96 N. Y. 264; 48 Am. Rep. 622.

In speaking of the cases of *Ryan* v. *New York Central R. R. Co.*, 35 N. Y. 210, 91 Am. Dec. 49, and *Pennsylvania R. R. Co.* v. *Kerr*, 62 Pa. St. 353, 1 Am. Rep. 431, which declare a doctrine antagonistic to that held by the supreme court of the United States, an able lawyer, John D. Lawson, says: "For they are not only opposed to all the English decisions, to every subsequent American case, but to the later adjudications of the very states in which they were decided." In support of his statement, Mr. Lawson cites a great number of cases: 4 South. L. Rev. 760, 761. Very much the same statement was made by Judge Cooley in his work on torts, to which we have already referred, and his statement is quoted in *Billman* v. *Indianapolis etc. R. R. Co.*, 76 Ind. 166; 40 Am. Dec. 230.

Following maxims with rigid strictness is a perilous proceeding. They are scant covers for great principles, and are sometimes as misleading as the wise saws or musty proverbs of a village oracle. It is idle to expect a terse maxim to adequately express a great principle; the most it can ordinarily do is to suggest the principle; but even so much as that it can only do in shadowy outline. "Legal maxims," it has been said, "are convenient currency, but they require the test, from time to time, of a careful analysis." "It is hardly fair, by the way," said an eminent English lawyer, "to find fault with a maxim for its brevity, though brevity should make us beware": 5 Law Quarterly Rev. 444. Mr. Townshend says: "We believe that not a single law maxim can be pointed out which is not obnoxious to objection": Ram on Judgments, 45.

These are echoes from the opinions of the judges who have frequently shown the folly of depending too much on maxims: *Black* v. *Ward*, 27 Mich. 191; 15 Am. Rep. 171; *Thurston* v. *City of St. Joseph*, 51 Mo. 510; 11 Am. Rep. 463; *Bonomi* v. *Backhouse*, 27 L. J., N. S., 378.

It is certainly true that the court which follows strictly and without expansion the maxim, *Causa proxima, non remota spectatur*, will go so far astray as to be unable to deal out justice to deserving suitors. But no court is bound to "stick in the bark" of a maxim; on the contrary, it is its duty to ascertain and give effect to the spirit of the principle which the maxim

dimly indicates, but does not fully express. In this instance, the spirit of the principle, of which the maxim quoted is a glimmering outline, requires that it should be adjudged that the appellant shall make good to the appellee the loss sustained by him from its tortious act.

Judgment affirmed.

RAILROADS — NEGLIGENCE — SETTING FIRES. — Where a railroad company negligently sets fire to its right of way, and the property of adjacent owners is thereby injured, the question whether or not the setting of the fire was the proximate cause is a question for the jury: *Haverly* v. *State etc. R. R. Co.*, 135 Pa. St. 50; 20 Am. St. Rep. 848. It is a presumption of law when an injury is done by a fire set out by a railroad that the company is negligent; but this may be overcome by showing that the company exercised due care and diligence: *Eage* v. *Chicago etc. R'y Co.*, 77 Iowa, 631.

SIMPSON *v.* DUFOUR.

[126 INDIANA, 322.]

COMMON CARRIER — ATTACHMENT OF GOODS IN TRANSIT — RIGHT OF CARRIER TO HOLD GOODS. — In an action against a common carrier to recover for taking goods which he has in transit from the possession of a sheriff who has levied upon them under a writ of attachment, it is a good defense that the property sought to be attached was not the property of the party against whom the writ of attachment issued, nor subject to levy and attachment against him.

C. S. Tandy and L. O. Schroeder, for the appellant.

F. M. Griffith and W. R. Johnston, for the appellees.

COFFEY, J. This case is here for the second time, and is reported in 95 Indiana, 302. The material facts as disclosed by the complaint are set out in the complaint as copied in the above report, and need not be repeated here. Upon a return of the cause to the Switzerland circuit court a substituted complaint was filed, and the appellant, as the then sheriff of the county, was substituted for Anderson, as plaintiff.

The appellee Dufour filed an answer consisting of nine paragraphs, to all of which the court sustained a demurrer, except the first and eighth. The eighth paragraph avers, substantially, that there was in force in the state of Kentucky a general statute, by the terms of which all persons who were the owners of warehouses in which were stored whisky, tobacco, etc., were denominated warehousemen; that such warehousemen were permitted to issue warehouse receipts for goods on

hand and stored in such warehouses; that such warehouse receipts were negotiable as inland bills of exchange; that Darling, on the sixth day of April, 1878, was the owner of a warehouse, in said state, in which was stored a large quantity of whisky, and that he was, by virtue of said statute of Kentucky, a warehouseman; that on said day the said Darling executed a warehouse receipt for 193 barrels of whisky, or cologne spirits, describing the barrels by their serial numbers and warehouse numbers; that the 40 barrels sought to be attached was a part of said 193 barrels; that said warehouse receipt was, on said sixth day of April, indorsed by said Darling to one Whitehead, and was by said Whitehead indorsed to one Ferdinand Schwill, of the city of Cincinnati, in the state of Ohio, to whom said whisky, on being shipped, was consigned; that by reason of said Schwill being the owner and holder of said warehouse receipt he thereby became the owner of said whisky on the sixth day of April, 1878, four days before the same was shipped, and was entitled to hold the same; that said warehouse receipt was issued and assigned to said Schwill by virtue of a written contract entered into by said Schwill and Darling and said Whitehead, in the fall of 1877, whereby, in consideration that Schwill would advance a large sum of money with which to repair said Darling's distillery, and furnish grain and material with which to operate said distillery, and also to purchase all revenue stamps for the whisky produced at said distillery, the said Schwill was to have the entire product thereof until he was fully repaid all money so advanced and paid out by him; that at the time said warehouse receipt was transferred to said Schwill, and at the time said 40 barrels were sought to be attached, Darling and said Whitehead, under the terms of said contract, were indebted to said Schwill in a sum exceeding the value of the whisky covered by said warehouse receipt; that by reason of said statute of Kentucky the said Schwill was the owner of said whisky, and the same was not subject to levy and attachment as the property of said Darling.

The statute of the state of Kentucky is set out in this answer.

After issues formed, the cause was tried by a jury, resulting in a verdict for the appellees, upon which the court rendered judgment.

The first assignment of error calls in question the correctness of the ruling of the circuit court in overruling the demurrer to the above answer.

It is contended by the appellant that it is no defense for Dufour to show that the property sought to be attached was not the property of Darling, against whom the writ of attachment was issued, and that it was the duty of Dufour to have permitted the sheriff to seize the property and leave the court to determine the question of ownership.

We are not inclined to adopt this view. The sheriff had no right to seize the property of Schwill on a writ of attachment against Darling. Had he done so he would have been a trespasser. It is true that in refusing to permit the levy, Dufour took the risk of rendering himself liable in the event it should be established that Darling owned the property, for then the sheriff would have been acting rightfully under his writ; but if the property was in fact Schwill's property, the sheriff cannot be heard to complain that the appellee prevented him from committing a trespass.

The appellee was a common carrier, and an insurer of the property in controversy, and it was his duty to hold it until such time as it reached its destination, unless taken from his possession lawfully: *Sherlock* v. *Alling*, 44 Ind. 184; *Pittsburgh etc. R'y Co.* v. *Hollowell*, 65 Ind. 188; 32 Am. Rep. 63; *Pennsylvania Co.* v. *Poor*, 103 Ind. 553; *McCulloch* v. *McDonald*, 91 Ind. 240.

If it was the property of Schwill it could not be lawfully taken from his possession by virtue of a writ of attachment against Darling. In our opinion, this answer stated a good defense to the cause of action set up in the complaint.

It is also urged by the appellant that the court erred in overruling his motion for a new trial.

It is claimed that the court erred in its instructions to the jury.

The instructions are quite voluminous, and no good purpose would be subserved by setting them out here.

We have given them a careful examination, and, when taken as whole, we think they state the law, substantially, as applicable to the case as made by the evidence.

With the general verdict the jury returned answers to special interrogatories, by which it is made to appear that the facts are as set out in the eighth paragraph of the answer. The case seems to have been correctly decided on its merits.

There is no substantial error in the record.

Judgment affirmed.

COMMON CARRIER — ATTACHMENT OF GOODS IN TRANSIT. — Goods in the hands of a common carrier, seized under process against the owner and taken out of the carrier's possession, releases the carrier from liability for non-delivery: *Jewett* v. *Olsen*, 18 Or. 419; 17 Am. St. Rep. 745, and note. In order to exercise the right of stoppage *in transitu* upon goods that have been attached, it is essential that the consignor shall learn of the consignee's insolvency after shipment: *Fenkhausen* v. *Fellows*, 20 Nev. 312.

CLEVELAND, COLUMBUS, CINCINNATI, AND INDIANAPOLIS RAILWAY COMPANY *v.* CLOSSER.

[126 INDIANA, 348.]

COMMON CARRIERS — VALIDITY OF CONTRACT FOR REBATE TO SHIPPER. — A contract between a common carrier and a grain shipper, by which the carrier agrees to receive at the time of shipment a designated sum as compensation for the transportation of grain, and to refund a certain part of the sum received when the transportation is completed, is valid and binding.

COMMON CARRIERS — VALIDITY OF CONTRACT FOR REBATE TO SHIPPER. — To give an illegal character to a contract between a common carrier and a shipper by which the latter is to receive a rebate on freight charged when the transit is ended, more must be shown than the mere fact that the parties stipulated for a rebate, as it cannot be presumed that fraud was intended or practiced, nor that there was any wrongful combination to secure an undue advantage over other shippers, nor that in stipulating for a rebate the carrier intended to make, in favor of a particular shipper, a discrimination forbidden by law.

COMMON CARRIER — VALIDITY OF CONTRACT DISCRIMINATING IN FAVOR OF ONE SHIPPER. — A mere discrimination will not invalidate a contract between a carrier and a shipper. To have that effect, other elements must enter into the contract, and when such elements are present in such force as to make the discrimination unjust or oppressive, the contract will be illegal. Whether or not the contract is impartial depends upon the circumstances of each particular case.

COMMON CARRIERS — ILLEGAL COMBINATION STIFLING COMPETITION — RIGHT TO MAKE SPECIAL CONTRACT WITH SHIPPER. — A contract between competing carriers forming a combination or "pool" for the purpose of preventing or stifling competition is illegal and void, and a contract between one of the associated carriers and a shipper, stipulating for a special rate, and containing no element of partiality, oppression, or improper favoritism, is valid and enforceable.

COMMON CARRIERS — COMBINATION TO STIFLE COMPETITION — BURDEN OF PROOF. — A combination between common carriers to prevent competition is *prima facie* illegal, and the burden of proof is on the carrier to remove the presumption by affirmative proof that the object of the combination was only to prevent ruinous competition, and that it does not establish unreasonable rates, unjust discriminations, or oppressive regulations. Until the presumption is thus removed, the combination must be held to be within the condemnation directed against all contracts which violate public policy.

PRACTICE — PRODUCTION OF EVIDENCE — REMEDY. — Where a motion requiring a party to produce certain books and papers is sustained, the party is not bound to disregard the order of the trial court, suffer for the disobedience, and then seek redress by appeal. An objection made and exception reserved in proper time is all that is required to be done to present the question on appeal.

PRACTICE — PRODUCTION AND USE OF EVIDENCE — PRESUMPTION. — Where instruments of evidence are used in the mode required by law, it cannot be said that there was prejudicial error, although the motion for their production may have been defective, or the order made upon it too broad. In such case it will be presumed on appeal that there was no irregularity or error in the ultimate action of the trial court.

EVIDENCE, WHEN ADMISSIBLE. — It is sufficient, to entitle evidence to admission, that there is some evidence, direct or circumstantial, tending to make it competent; for it is not necessary that the connecting evidence should distinctly establish the facts which give the character of competency to the testimony, as the court, in admitting testimony, does not conclusively adjudge that the evidence establishing its competency is sufficient to fully prove the requisite fact. It simply declares that there is some evidence tending to make the testimony competent.

AGENCY — SCOPE — DECLARATIONS AS TO PAST TRANSACTION. — Where authority is delegated to an agent to transact business, and that business requires continuous negotiations, or is a business not fully ended by a single act, and requires a series of acts to complete it according to the intention of the parties and commercial usages, the authority of the agent does not expire with the performance of one act, although that act may be of prime importance. The rule is the same when the agent has authority to conduct a single transaction; for as to that, he is a general agent, with authority to perform all acts necessary to fully consummate the transaction. This rule, however, does not permit the declarations of an agent narrating a past transaction to be given in evidence.

COMMON CARRIERS — SPECIAL CONTRACT WITH SHIPPER — RIGHT TO REBATE. — Where a common carrier makes a special contract with a shipper to repay part of the sum received, he must perform his part of the contract, unless he overthrows the presumption of fairness and right by countervailing facts. The shipper need not first prove that the rate charged and paid under the contract was excessive and unjust, as his right to recover rests upon the contract stipulating for a rebate.

PRACTICE. — SPECIAL FINDINGS MUST BE CONSIDERED AS A WHOLE, and cannot be dissected into fragmentary parts, and successfully assailed in detail. One part must be considered in connection with other connected parts, or parts referring to the same transaction, and if, taken as a whole, the findings legitimately support the judgment, it will be upheld.

PRACTICE — SPECIAL FINDINGS — SUFFICIENCY OF. — Where by a special finding the substance of the issue is established, it is sufficient; and that it contains more facts than plaintiff is required to prove does not vitiate it, provided such facts are connected with the main issue, support it, and do not establish a distinct and independent cause of action.

COMMON CARRIERS — SPECIAL CONTRACT WITH SHIPPER — VALIDITY OF. — A contract binding a carrier to transport as many car-loads of grain as the shipper may desire transported is not illegal and ineffective for the reason that the shipper is under no obligation to ship any definite or designated quantity of grain. When acts are done in performance of the

contract, it is valid as to those acts, although the contract may be revocable, for until there is an effective revocation the contract remains in force.

COMMON CARRIERS — SPECIAL CONTRACT WITH SHIPPER — WAIVER BY AGENT. — Where, under a special contract between a carrier and a shipper, it appears that the contracting shipper was first prohibited from claiming a rebate on grain consigned by him to a certain third party, and that subsequently thereto an authorized agent of the company entered into a contract as to rebates with the shipper, treating the former interdiction as withdrawn and ineffective, and inducing the shipper to believe that it had no force, he is entitled to rebates on grain subsequently shipped by him to such third party.

H. H. Poppleton, *A. C. Harris*, *and W. H. Calkins*, for the appellant.

B. Harrison, *W. H. H. Miller*, *J. B. Elam*, *and J. Kopelke*, for the appellees.

ELLIOTT, J. The appellees were partners, under the name of Closser & Co., and, as such, prosecute this action against the appellant. They base their right of action upon contracts made with the appellant, wherein it undertook to transport grain from Indianapolis to the sea-board, and they charge that the appellant agreed to receive, at the time of the shipment, a designated sum as compensation for the transportation of the grain, and to refund to them a certain part of the sum received. They demand that the appellant be compelled to respond in damages for a breach of the agreement to refund part of the money paid to it as freight on the grain carried under the contracts.

In the first paragraph of the complaint it is alleged that on the fifteenth day of September, 1884, the appellant made a contract with Closser & Co., wherein it agreed to transport grain from Indianapolis to Philadelphia, "at the price of sixteen and a half cents per hundredweight, at the same time stipulating that Closser & Co. should pay the defendant at the rate of twenty-one cents per hundredweight, but should be entitled to a rebate of four and a half cents per hundredweight, to be repaid to Closser & Co. promptly after such shipments."

The contract described is valid. It is not different in any material respect from the ordinary one in which the carrier stipulates directly to carry goods at a fixed rate, for the agreement to repay does not of itself change the legal effect of the undertaking to such an extent as to transform it into an illegal contract. It is, in contemplation of law, nothing more

than an agreement to carry the grain at the compensation ultimately agreed upon, inasmuch as the provision binding the carrier to pay back part of the nominal compensation simply fixes the amount of the actual compensation, although it does provide for a peculiar mode of payment. There is no element of moral or legal wrong in an agreement to repay part of the compensation received. To give an illegal character to such an agreement, more must be shown than the mere fact that the parties stipulated for a rebate. In simply making a rebate, or in providing for a drawback, parties violate no law, and their contract must stand. It cannot be presumed that fraud was intended or practiced, nor can it be presumed that there was any wrongful combination to secure an undue advantage over other shippers; neither can it be presumed that in stipulating for a rebate the carrier intended to make, in favor of the particular shipper, a discrimination forbidden by law. It is by no means every favor shown a particular shipper, although it may constitute, in some measure, a discrimination favorable to him and unfavorable to other shippers, that impresses upon a contract for the carriage of goods the seal of condemnation. The common-law authorities (and by them this case is ruled) fully support the doctrine that a mere discrimination will not invalidate a contract; to have that effect, other elements must enter into the contract; but when such elements are present in such force as to make the discrimination unjust or oppressive, the contract will be illegal. It is not necessarily or *per se* a legal wrong for a carrier to give better rates to one who ships many car-loads of grain, than to one who ships a single car-load or a single bushel. It is a matter of common knowledge, and therefore one of which judicial notice is taken, that an increase in the volume of business is desirable and advantageous; and in the rivalry of business competition it is lawful to favor those whose business is great, rather than those whose business is small or inconsiderable.

In the case of *Nicholson* v. *Great Western R'y Co.*, 7 Com. B., N. S., 755, 1 Nev. & McN. R'y etc. Cas. 143, Erle, C. J., said: "I take the free power of making contracts to be essential for making commercial profit. Railway companies have that power as free as any merchants, subject only (as to this court) to the duty of acting impartially, without respect of persons; and this duty is performed when the offer of contract is made to all who wish to adopt it. Large contracts may be beyond

the means of small capitalists; contracts for long distances may be beyond the needs of those whose traffic is confined to a home district; but the power of the railway company to contract is not restricted by these considerations."

It is obvious that whether the common carrier acts impartially or not depends upon the circumstances of the particular case, for regard must be had to such circumstances as quantity, distance, and kindred considerations. The hinge of the question is not found in the single fact of discrimination, for discrimination without partiality is inoffensive, and partiality exists only in cases where advantages are equal, and one party is unduly favored at the expense of another who stands upon an equal footing. Many English cases support this general doctrine: *Garton* v. *Bristol etc. R'y Co.*, 1 Best & S. 112; *Hozier* v. *Caledonian R'y Co.*, 1 Nev. & McN. R'y Cas. 27; *Great Western R'y Co.* v. *Sutton*, L. R. 4 H. L. 226; *Ransome* v. *Eastern etc. R'y Co.*, 1 Com. B., N. S., 437; *Jones* v. *Eastern etc. R'y Co.*, 1 Nev. & McN. R'y Cas. 45; *Oxlade* v. *North Eastern R'y Co.*, 1 Nev. & McN. R'y Cas. 72; *Baxendale* v. *Railway Co.*, 5 Com. B., N. S., 336; *Bellsdyke etc. Co.* v. *North British R'y Co.*, 2 Nev. & McN. R'y Cas. 105.

The current of judicial opinion in America flows in the general channel marked out and opened by the courts of England: *Bayles* v. *Kansas etc. R'y Co.*, 13 Col. 181; *Spofford* v. *Boston etc. R. R. Co.*, 128 Mass. 326; *Fitchburg R. R. Co.* v. *Gage*, 12 Gray, 393; *Johnson* v. *Pensacola etc. R. R. Co.*, 16 Fla. 623; 26 Am. Rep. 731; *Ragan* v. *Aiken*, 9 Lea, 609; 42 Am. Rep. 684; *McDuffee* v. *Portland etc. R. R. Co.*, 52 N. H. 430; 13 Am. Rep. 72; *Hersh* v. *Northern Central R'y Co.*, 74 Pa. St. 181; *Christie* v. *Missouri Pacific R'y Co.*, 94 Mo. 453; *Chicago etc. R. R. Co.* v. *People*, 67 Ill. 11; 16 Am. Rep. 599; *Toledo etc. R'y Co.* v. *Elliott*, 76 Ill. 67; *Erie and Pacific Despatch* v. *Cecil*, 112 Ill. 185; *Root* v. *Long Island R. R. Co.*, 114 N.Y. 300; *Kilmer* v. *New York etc. R. R. Co.*, 100 N. Y. 395; 53 Am. Rep. 194; *Stewart* v. *Lehigh etc. R. R. Co.*, 38 N. J. L. 505; *Union Pacific R'y Co.* v. *United States*, 117 U. S. 355; *Hays* v. *Pennsylvania Co.*, 12 Fed. Rep. 309; *Interstate Commerce Commission* v. *Baltimore etc. R. R. Co.*, 8 Railway and Corporation Law Journal, 343.

The cases of *State* v. *Cincinnati etc. R'y Co.*, 47 Ohio St. 130, *Scofield* v. *Lake Shore etc. R'y Co.*, 43 Ohio St. 571, and *Messenger* v. *Pennsylvania R. R. Co.*, 36 N. J. L. 407, 13 Am. Rep. 457, are not entirely out of line with the decisions to

which we have referred, although fragmentary expressions found in some of the opinions seemingly pass the lines of principle. It is very doubtful whether the reasoning in the case of *Burlington etc. R'y Co.* v. *Northwestern Fuel Co.*, 31 Fed. Rep. 652, can be regarded as sound, or be made to harmonize with the reasoning in the much more carefully considered case of *Interstate Commerce Commission* v. *Baltimore etc. R. R. Co.*, 8 Railway and Corporation Law Journal, 343; but, granting the reasoning to be unimpeachable and the conclusion sound, the decision cannot be regarded as of controlling influence in such a case as the one at our bar. In the case upon which we are commenting, a recovery was adjudged on the ground that the difference in the rate charged shippers of large quantities of goods and that charged shippers of small quantities was so gross as to be against public policy. We have no such question here. So far as concerns the question of the right to discriminate between shippers, we concur with the general doctrine of the case cited, for we have no doubt that an unjust, unfair, or oppressive discrimination is prohibited by the soundest considerations of public policy; but, as we have already suggested, we do not believe that from the sole fact that there is a discrimination a conclusion can be inferred which invalidates the special contract between the carrier and the shipper, for to warrant such a conclusion, without defying principle, another element must be added to the premises, and that element is this: the discrimination is unjust or oppressive.

In the later case of *Stewart* v. *Lehigh etc. R. R. Co.*, 38 N. J. L. 505, the decision in *Messenger* v. *Pennsylvania R. R. Co.*, 36 N. J. L. 407, 13 Am. Rep. 457, is explained, and it was said: "The contract held invalid in the Messenger case, above cited, was indeed one inuring to the benefit of the individual and against the corporation; but its terms were such that it could not possibly be effectuated without giving the plaintiff a preference over the public; it was, in effect, that whatever rate should be charged against any one else twenty per centum less should be charged to the plaintiff. Plainly, such a contract was not consistent with the company's duty of impartiality. As soon as the general rates were reduced to the standard of the plaintiff's, he was entitled to have his rates reduced twenty per centum lower." It is evident from this that the courts of New Jersey did not hold, nor mean to hold, that a contract giving a special rate and providing for a

drawback was in itself illegal and void. We do not regard the decision in the case of *Indianapolis etc. R. R. Co.* v. *Ervin*, 27 Am. & Eng. R. R. Cas. 8, as relevant to the point under immediate consideration, and for this conclusion we assign these reasons: The decision is founded upon an express statute, and proceeds upon the assumption that the discrimination was an unjust one. Whether that case does or does not overrule the earlier cases decided by the same court we need not inquire, for, however this may be, the reasoning in the earlier cases harmonizes with the doctrine of the standard authorities, and commands our assent. We believe those cases are right in asserting that a preferential rate, although made effective by a provision for a drawback, does not, of its own force, destroy the contract; but in assenting to the conclusion stated, we do not mean to be understood as asserting that where a preferential rate is given, the fact that a drawback is provided for may not exert an important influence upon the decision of the question whether the discrimination is or is not an unjust one; on the contrary, we mean to do no more than affirm that the single fact will not justify a judicial declaration of illegality. Whether it may be considered, in connection with other facts, as tending to show an unjust discrimination is a different question from the one before us.

The conclusion that common carriers may, within the limits of fairness and impartiality, consult their own interests underlies the decisions which we have referred to as correct exponents of the law; and this general conclusion is affirmed in our own case of *Louisville etc. R'y Co.* v. *Flanagan*, 113 Ind. 488; 8 Am. St. Rep. 674; and from the doctrine of that case we see no reason for departing. This principle has been given force in many other cases: *Chicago etc. R. R. Co.* v. *Iowa*, 94 U. S. 155; *Easton* v. *Houston etc. R. R. Co.*, 32 Fed. Rep. 897; *Glasgow Steamship* v. *Mackinnon*, 27 Am. & Eng. R. R. Cas. 1; *Mogul Steamship Co.* v. *McGregor*, 39 Alb. L. J. 50.

The second paragraph of the complaint alleges that the defendant is, and long has been, a common carrier of goods, and that its custom, of long standing, is to make contracts for carrying grain from Indianapolis to the Eastern cities; that the plaintiffs have long been engaged in the business of buying, selling, and shipping grain; that on the first day of November, 1884, the plaintiffs, under the firm name of Closser & Co., entered into a contract with the defendant whereby it undertook to transport grain from a station on its road, known

as Union City, to the city of New York; that at the time this contract was made "there was no open and established rate of freight charges for carrying such grain, except a certain rate agreed upon between the defendant and other railway companies owning competing lines; the rate so fixed by the competing companies was established by an agreement made by them for the purpose of preventing competition," and was enforced and maintained, in so far as it was enforced and maintained, by an agency of such companies established for that purpose, and called a "pool"; that the "pool" was managed by a person selected by the companies for that purpose, and called a "pool commissioner"; that at the time mentioned all the railway companies that "were so located or situated as to be competitors for such freight were parties to said arrangement and 'pool'; that the rate established by the combination of common carriers was twenty-one and a half cents per hundredweight; that the defendant, "notwithstanding such combination and pool, offered and gave to Closser & Co. an inducement for shipping freight over its line at a rate lower than that fixed by the combination and 'pool'; but in order to do this, and be able to report to the pool commissioner that such pool rate had been charged," the defendant "requested Closser & Co., when shipping freight over its lines, to pay the pool rate, and agreed at the same time with Closser & Co. to pay a certain portion of the pool rate so charged, as a rebate, in order that the shippers might, in the end, be only required to pay the rate fixed by the defendant"; that "in this manner and for this purpose the defendant did, on the same day, agree with Closser & Co., in respect to the shipment of grain, that Closser & Co. should pay the pool rate of twenty-one and a half cents per hundredweight, and that the defendant would thereupon repay to them four and a half cents on every hundredweight of grain so shipped as a rebate, so that they should, in the end, pay as freight upon such shipment but seventeen cents per hundredweight, which was then in fact the rate of the defendant for such freight between said points as then agreed upon, which rebate the defendant agreed to pay promptly after such shipment." It is also alleged that grain was shipped by Closser & Co. under the contract, and that they paid the "pool" rate.

The third paragraph is essentially the same as the second, so far as concerns the combination and pool, the agreement for rebate, and the like, but it counts upon a contract, similar

to that described in the second paragraph, made on the tenth day of November, 1884, and also alleges that the defendant refused to furnish forty-two cars demanded by the appellees and needed by them for the transportation of wheat which they had ready for shipment.

The fourth paragraph of the complaint contains, substantially, the same allegations respecting the combination and "pool" as those found in the two preceding paragraphs, but it is alleged that on the thirtieth day of September, 1884, and the second day of October of that year, the open and established rate was twelve cents per hundredweight. It is also alleged in this paragraph that Closser & Co. entered into contracts with the defendant on the days named, wherein it was agreed that it would transport all the grain that they might buy and tender for shipment at that rate, although the combination might increase the rate. It is further alleged that wheat was shipped under the contract; that rates were increased by the combination; that the appellees paid the increased rate, and are entitled under their agreement to a rebate.

The central question presented for our decision is as to the validity of the contract between the rival railroad companies, described in the second, third, and fourth paragraphs of the complaint; for if that contract was valid, it established an open rate, and a shipper would have no right to unite with one of the competing companies to secure, by an undue preference, an advantage over other shippers, or by that means defraud or mislead other carriers who were parties to the agreement creating the "pool." If the combination was a lawful one, then those who had notice of its existence were bound to refrain from assisting a party to it in defrauding or deceiving other members of the combination for the purpose of securing an advantage for himself over other shippers. If, to descend from a generalization to the particular instance, the combination of the competing carriers was a lawful one, and was known to Closser & Co., and they contracted for a rebate in violation of the terms of the contract which bound the carriers together, and established a rate to which all were under a duty to conform, they cannot recover back the sum paid in excess of the rate established by the combined companies. If, however, their agreement was illegal, the courts will turn them away with the answer that, in substance at least, has been so often given suitors: "No polluted hand shall touch the pure fountains

of justice." One whose road lies through a corrupt contract —a contract which violates the rules of public policy or of commercial honesty—cannot recover back money paid under it. The courts will leave the parties where it found them. But if the contract which bound the rival carriers together was illegal, then it was incapable of conveying any right to any person, since a void thing is as a thing without existence or capacity for existence. If that contract was totally destitute of force, then no person was under an obligation to regard or respect it, for all were bound to know, as matter of law, that it was ineffective for any purpose.

It further follows that if the contract creating the combination was not entitled to respect, there was no obstacle barring the way to a contract between a carrier and a shipper stipulating for a special rate. It still further follows that if the contract between the associated carriers was utterly without force, it is inconceivable that it should obstruct the otherwise unfettered power to make contracts for the transportation of goods where no element of partiality, oppression, or improper favoritism entered into the transaction. Do but grant that the contract between the carriers was void, and it must inevitably follow that it neither obstructs the right to provide by special contract for a special rate, nor makes an act which ignores or disregards the attempt to form such a combination as that described in the complaint wrongful or illegal.

The line of thought we are pursuing naturally leads to the suggestion that where a contract is so corrupted by illegality as to be utterly void, no one of the parties to it, nor any one basing a claim upon it, can successfully assert that a third person who disregards it has committed any wrong or violated any duty; for it seems perfectly clear that no right entitled to respect can arise out of a contract prohibited and condemned by law. It is evident that whatever path be chosen in this instance, it leads at last to the pivotal question whether the contract upon which rests the combination formed by the associated carriers possesses any vitality.

We preface our discussion of the central question by saying that we are not, at this point, dealing with a case where a combination is formed for the purpose of preventing ruinous competition, and in which there is no design to stifle fair competition. We are not required to decide, nor do we decide, that combinations fair to the public, untainted by any sinister design, and formed solely to prevent the destruction of busi-

ness by unregulated competition, may not be valid. There are, we know, cases sanctioning the doctrine that combinations may be formed where the purpose is lawful, and the means employed not forbidden by positive law or high considerations of public policy: *Central Trust etc. Co.* v. *Ohio Central R. R. Co.*, 23 Am. & Eng. R. R. Cas. 666; *Boston Chamber of Commerce* v. *Lake Shore etc. R'y Co.*, 32 Am. & Eng. R. R. Cas. 618; *Hare* v. *London etc. R'y Co.*, 2 Johns. & H. 80; *Leslie* v. *Lorillard*, 110 N. Y. 519; *Manchester etc. R. R. Co.* v. *Concord Railroad*, 8 Railway and Corporation Law Journal, 443. The doctrine of these cases we neither affirm nor deny; we do, however, declare that they are not relevant to the matter here in dispute. It is, however, both appropriate and necessary to adjudge that a combination between common carriers to prevent competition is, at least, *prima facie* illegal. The doubt is, as to whether any ultimate purpose can save it from the condemnation of the law; there can be no doubt that, unexplained, such a combination for such a purpose is condemned by public policy. If such a combination can, in any event, be admitted to be legal, it can only be so where it is affirmatively shown that its object was to prevent ruinous competition, and that it does not establish unreasonable rates, unjust discriminations, or oppressive regulations. If such a contract can stand, it must be upon an affirmative showing, and one so full, complete, and clear as to remove the presumption (to which its existence, in itself, gives rise) that it was formed to do mischief to the public by repressing fair competition. The burden is on the carrier to remove the presumption, and until it is removed the agreement providing for the combination gives way before this presumption, and the agreement must be held to be within the condemnation directed against all contracts which violate public policy.

Coming to the question which awaits our judgment, and to which we have cleared our path, we affirm that a contract between corporations charged with a public duty, such as is that of common carriers, providing for the formation of a combination having no other purpose than that of stifling competition, and providing means to accomplish that object, is illegal. The purpose to break down competition poisons the whole contract, and there is here no antidote which will rescue it from legal death. The element which destroys the contract is the purpose to stifle competition; for a combination of rival carriers, moved and controlled by that purpose alone,

is destructive of public interest, and to the last degree antagonistic to sound public policy. The principle on which this rule rests is a very old one, and its place in the law is very firm. The overshadowing element in this case and in kindred cases is the purpose which influences the parties in uniting themselves in a combination, and concerting means to make its purpose effective, for the law abhors a combination which has for its principal object the suppression of competition in matters of commerce in which the public have an interest. Among the early cases establishing and enforcing the general principle which now occupies our attention are those wherein it is held that an agreement to prevent or hinder competition at public sales is void. For illustrations, although there is a vast number of cases, we need not look beyond our own reports. Our court has again and again enforced the general principle we have stated: *Hunter* v. *Pfeiffer*, 108 Ind. 197; *Board etc.* v. *Verbarg*, 63 Ind. 107; *Maguire* v. *Smock*, 42 Ind. 1; 13 Am. Rep. 353; *Gilbert* v. *Carter*, 10 Ind. 16; 68 Am. Dec. 655; *Forelander* v. *Hicks*, 6 Ind. 448; *Plaster* v. *Burger*, 5 Ind. 232; *Bunts* v. *Cole*, 7 Blackf. 265; 41 Am. Dec. 226.

"No one," said the court in *Hunter* v. *Pfeiffer*, 108 Ind. 197, "can predicate an enforceable right upon such an agreement." In support of this statement the court cited *Atcheson* v. *Mallon*, 43 N. Y. 147; 3 Am. Rep. 678; *Woodworth* v. *Bennett*, 43 N. Y. 273; 3 Am. Rep. 706; *Gibbs* v. *Smith*, 115 Mass. 592; *Hannah* v. *Fife*, 27 Mich. 172. Relevant and striking illustrations of the scope and force of the general principle are supplied by what are known as the Sugar Trust Cases, decided by the courts of New York, — cases rich in argument and authority: *People* v. *North River Sugar Refining Co.*, 22 Abb. N. C. 164. See also Law Literature of Trust Combinations, etc., 23 Abb. N. C. 317; *People* v. *North River Sugar Refining Co.*, 121 N. Y. 582; 18 Am. St. Rep. 843. The authorities collected in those cases demonstrate the proposition that a trust or combination having for its purpose the suppression of free competition cannot live where the common law prevails. There are, however, cases which in their facts bear a closer resemblance to the present than the Sugar Trust Cases; but after all, it may be said with propriety, the important thing to be secured is a sound and salutary general principle, and not merely cases with closely resembling facts. There is no difficulty in securing the principle we seek, for

cases almost without number assert and enforce it in an almost endless variety of forms and phases.

One of the cases near akin to the one before us is that of *Hooker* v. *Vandewater*, 4 Denio, 349; 47 Am. Dec. 258. In that case, competing canal companies combined and agreed to fix an established rate of freight, and to divide profits. The agreement was adjudged illegal, the court saying, among other things, that "it is a general proposition that an agreement to do an unlawful act cannot be supported at law; that no right of action can spring out of an illegal contract; and this rule applies not only when the contract is expressly illegal, but whenever it is opposed to public policy." Still closer is the resemblance between this case and that of *Texas etc. R'y Co.* v. *Southern Pacific R'y Co.*, 41 La. Ann. 970; 17 Am. St. Rep. 445. The court there held a "pooling contract," substantially the same as the one described in the appellees' complaint, to be void, and in support of its ruling referred to the cases of *Gibbs* v. *Consolidated Gas Co.*, 130 U. S. 396; *Woodstock Iron Co.* v. *Richmond etc. Extension Co.*, 129 U. S. 643; *Morris Run Coal Co.* v. *Barclay Coal Co.*, 68 Pa. St. 173; *Arnot* v. *Pittston etc. Coal Co.*, 68 N. Y. 558; 23 Am. Rep. 190; *Craft* v. *McConoughy*, 79 Ill. 346; 22 Am. Rep. 171; *Morrill* v. *Boston etc. R. R. Co.*, 55 N. H. 531; *Jackson* v. *McLean*, 36 Fed. Rep. 218; *Santa Clara Valley etc. Co.* v. *Hayes*, 76 Cal. 387; 9 Am. St. Rep. 211; *Firemen's Charitable Ass'n* v. *Berghaus*, 13 La. Ann. 209; *India Bagging Ass'n* v. *Kock*, 14 La. Ann. 168; *Glasscock* v. *Wells*, 23 La. Ann. 517; and *Cummings* v. *Saux*, 30 La. Ann. 207.

The authorities found on every hand not only fully support our conclusion that a contract between competing carriers forming a combination for the purpose of stifling competition is *prima facie* illegal, but many of them carry the principle to a much greater length; it is enough for us, however, that the law, as it has long existed, sustains the conclusion we here affirm, since it is neither necessary nor proper for us to go beyond the case before us for judgment.

Questions respecting rulings upon matters of evidence next require our attention. The first of these questions arises on the ruling sustaining the motion of the appellees requiring the production of books and papers. Counsel for the appellees respond to the argument of their opponents upon this question by asserting, as their primary proposition, that the appellant is not in a situation to avail itself of this ruling, inasmuch as

was agreed that they should be allowed a drawback, or rebate, on grain consigned to them. On the 25th of September, 1884, after the first contract described in the fourth paragraph of the complaint had been entered into, but before the second contract there described was made, the appellant, by one of its officers, forbade the allowance of drawbacks on grain shipped to Gill and Fisher, and the evidence shows that notice of the interdiction was given to Closser & Co. on the twenty-sixth day of the same month. If no more than this appeared, we should be inclined to hold that there was a valid revocation and an effective interdiction upon contracts allowing Closser & Co. a drawback on grain consigned to Gill and Fisher; but more does appear, for it appears that a person representing the company — one, too, who had acted for it in making former contracts with Closser & Co. — solicited and obtained the contract entered into on the 2d of October, treated the order referred to as ineffective, and induced Closser & Co. to believe that it had no force. It is probably true that the evidence is not so satisfactory upon the question of the authority of the agent who represented the appellant in making the contract of October 2d, or as to whether the interdiction was abrogated or withdrawn, as might be desired; but there is evidence tending to prove that an agent, superior to the one who gave the order forbidding drawbacks on grain shipped to Gill and Fisher, authorized the contracts to be made, and that all agents of the company concerned in the transactions declared that the interdiction was withdrawn, and treated it as devoid of force. In this state of the evidence we must, in obedience to a long-settled rule, decline to disturb the decision of the trial court upon the controverted question of fact.

A cross-error assigned by the appellees challenges the correctness of the conclusion of law which denies a full recovery upon the cause of action stated in the third paragraph of the complaint, and we have carefully studied the finding upon that branch of the case. The result of our examination is, that the facts stated are not so full and clear as to authorize us, as in favor of a party having the burden of proof, to overthrow the conclusion of law stated by the trial court, although the question is a very close one, and our conclusion upon it is reached with some hesitation.

Judgment affirmed.

COMMON CARRIER — RIGHT TO DISCRIMINATE. — A common carrier must carry for all who apply, but he may discriminate as to rates, so long as no unreasonable charge is made: *Avinger* v. *South Carolina R. R. Co.*, 29 S. C. 265; 13 Am. St. Rep. 716. As to the right of carriers to discriminate, and what are just and what unjust discriminations, see extended note to *Root* v. *R. R. Co.*, 11 Am. St. Rep. 647–655. An agreement to give exclusive privileges is against public policy and void: *Cravens* v. *Rodgers*, 101 Mo. 247. A contract tending to create a monopoly is against public policy and void: *Bayles* v. *Kansas etc. R. R. Co.*, 13 Col. 181.

COMMON CARRIER — REBATE. — A common carrier can contract to ship freight at a lower rate than the regular tariff rate unless such rate is granted exclusively to one shipper, which would render it void: *Christie* v. *Missouri etc. R. R. Co.*, 94 Mo. 453.

AGENCY — SCOPE OF AGENT'S AUTHORITY. — A general agent may bind his principals by an act contrary to special instructions, if such act was made within the scope of his authority: *Ruggles* v. *American etc. Ins. Co.*, 114 N. Y. 415; 11 Am. St. Rep. 674, and note. An agent authorized to make a contract is authorized to do everything necessary to bring about such contract: *Busch* v. *Wilcox*, 82 Mich. 315; *Wise* v. *Newatney*, 26 Neb. 88; *Mars* v. *Mars*, 27 S. C. 132; *Raynor* v. *Bryant*, 43 Kan. 492.

KINGMAN *v.* PAULSON.

[126 INDIANA, 507.]

JUDGMENT BY CONFESSION RENDERED IN ANOTHER STATE CANNOT BE COLLATERALLY ATTACKED. — A judgment by confession rendered by a court of general jurisdiction in another state, the record being regular, and showing an appearance on behalf of the defendant, and that such appearance was authorized by power of attorney duly executed by such defendant, cannot be collaterally attacked in a sister state. The same faith and credit must be given such judgment as if rendered within the state.

JUDGMENT — COLLATERAL ATTACK. — A judgment is not void unless the thing lacking or making it so is apparent in the record; and unless a judgment is void, it cannot be collaterally attacked, although it may be voidable.

JUDGMENT BY CONFESSION RENDERED IN ANOTHER STATE — COLLATERAL ATTACK — RES JUDICATA. — A judgment by confession rendered by a court of general jurisdiction in another state, against a man and his wife, fixes her *status* and relation to the debt on which the action was brought, and her liability for its payment; and in attachment proceedings against her property instituted on the judgment in another state, she cannot, for the first time, set up as a defense that the debt represented by the judgment is the debt of her husband, and that she was only surety upon the note sued upon and merged in such judgment.

J. C. Blacklidge, W. E. Blacklidge, and B. C. Moon, for the appellants.

J. F. Elliott and L. J. Kirkpatrick, for the appellee.

OLDS, C. J. This action was brought by the appellee, William A. Paulson, against the appellants, Martha A. Kingman and Arthur L. Kingman, in the Howard circuit court, upon a judgment rendered in the superior court of Cook County, Illinois, in favor of said appellee against said appellants. Attachment proceedings were also instituted in this case, and the property of the appellant Martha A. Kingman was attached.

Two questions are presented by the record and discussed by counsel. It is first contended by counsel for appellants that the judgment of the superior court of Cook County is not conclusive, and that it may be attacked collaterally in this case. The record of the judgment in the superior court shows it to be a judgment by confession upon a promissory note, the note executed by the appellants being payable to J. Robson Weddell, and afterwards indorsed by him to the appellee. The appellants executed a power of attorney appointing and authorizing the appellee, William A. Paulson, or any attorney of any court of record, to be their true and lawful attorney, irrevocable, for them and in their names, place, and stead to appear before any court of record, either in term time or in vacation, in any of the states or territories of the United States, at any time after the expiration of said note, to waive the issuing and service of process, and confess judgment, etc. The note is payable at the office of Weddell in Chicago.

The record shows an appearance by Clifford, Anthony, and Paulson on behalf of the appellee herein, the plaintiff in said cause, and the filing of the complaint, and by William P. Winners, the attorney for the defendants in said cause, the appellants herein, the filing of the warrant of attorney as his authority to appear, and that proof of its execution was duly made, and the judgment is regular in form.

The question presented is as to whether or not a judgment of a court of a sister state having general jurisdiction, the record being regular, and showing an appearance on behalf of the defendant or defendants, and a confession of judgment against them, and that such appearance was authorized by a power of attorney, duly executed by such defendants, authorizing such appearance and confession of judgment, can be attacked collaterally; that it cannot be attacked is too well settled to be open to discussion. Section 1, article 4, of the constitution of the United States provides that "full faith and credit shall be given in each state to the public acts, records,

and judicial proceedings of every other state." Freeman, in his work on judgments, third edition, section 560, says: "The language of the supreme court in *Mills* v. *Duryee*, which, substantially, was but a quotation from the act of 1790, that a judgment must, in every state, be given the same faith and credit to which it is entitled where it was rendered, was so comprehensive and distinct as to seem to negative the existence of any exception to the broad rule here laid down, and to impart to such a judgment in all cases and in all localities the full effect of a domestic judgment." Giving to the judgment the same faith and credit as given to a judgment rendered by a court of general jurisdiction within this state, it cannot be collaterally attacked; and this same rule applies to judgments by confession: Freeman on Judgments, sec. 557. As applicable to this case, there having been an appearance, it is well-settled law that a judgment is not void unless the thing lacking, or making it so, is apparent in the record. If it do not so appear, the judgment is not void, though it may be voidable: *Smith* v. *Hess*, 91 Ind. 424. And unless a judgment be void, it cannot be attacked collaterally: *Lantz* v. *Maffett*, 102 Ind. 23; *Bailey* v. *Martin*, 119 Ind. 103.

In *Caley* v. *Morgan*, 114 Ind. 350, it is held that when a party submits himself to the jurisdiction of a competent court and confesses judgment, and the court enters judgment for the amount admitted to be due, it will be presumed that all the preliminary steps necessary to confer jurisdiction were taken. In the case at bar, it affirmatively appears by the record of the judgment in the superior court of Cook County that all things existed to give the court jurisdiction, and to permit it to be attacked in this case would be to impeach and contradict the record collaterally, and this cannot be done. If for any reason the superior court did not have jurisdiction, or the judgment was obtained by fraud, as contended by counsel for appellant, such facts might be grounds for setting aside and avoiding the judgment in a direct attack; but until it is so attacked and set aside it is binding upon the parties, and its validity cannot be questioned in a suit upon the judgment.

The further contention by counsel for appellant is, that as a defense to the judgment and attachment proceedings it may be shown by the appellant Martha A. Kingman that she and her co-appellant, Arthur L. Kingman, are husband and wife, and that the debt represented by the judgment is the debt of her husband, and that she was only surety upon the note sued

upon, and merged in the judgment rendered in the superior court of Cook County, Illinois, and that the property attached is her individual property, and not liable for the debt. We cannot agree with this contention of counsel. The judgment in the superior court fixed her *status* and relation to the debt, and liability for its payment. That is an individual judgment against her and her husband, both as principals, and for which her property is liable, and by that judgment she is bound.

The time for her to have established her suretyship was when she was sued upon the note. In the case of *Lieb* v. *Lichtenstein*, 121 Ind. 483, Mrs. Lieb was sued in the superior court of Cook County, Illinois, and a judgment rendered against her upon a note which was signed by her and her husband, and secured by mortgage on real estate situate in Elkhart County, Indiana; and in the suit to foreclose the mortgage it was sought by Mrs. Lieb to show that the debt for which judgment was rendered was the debt of her husband, and she was only surety, and the property mortgaged for its payment was her individual property, and therefore was not liable, and it was held that she could not make such defense; that having failed to set up her suretyship when sued in the superior court, she was bound by the judgment which fixed her liability for the debt.

There is no error in the record.

Judgment affirmed, with costs.

JUDGMENT. — A judgment regularly entered by a court of competent jurisdiction cannot be collaterally impeached: *Wilkerson* v. *Shoonmacker*, 77 Tex. 615; 19 Am. St. Rep. 803; *Williams* v. *Haynes*, 77 Tex. 283; 19 Am. St. Rep. 252, and note. As to the validity and conclusiveness of judgments of courts of sister states, see note to *Hood* v. *State*, 26 Am. Rep. 27–33; note to *Bartlett* v. *Knight*, 2 Am. Dec. 42–45; *Knickerbocker* v. *Wilcox*, 83 Mich. 200; 21 Am. St. Rep. 595.

JUDGMENTS OF SISTER STATES. — It may be laid down as a general rule that the judgment of a sister state is entitled to full faith and credit in every other state, and cannot be collaterally attacked: *Thomas* v. *Morrisett*, 76 Ga. 384; *Drake* v. *Granger*, 22 Fla. 348; *McDonald* v. *Drew*, 64 N. H. 547; *Rea* v. *Scully*, 76 Iowa, 343; *Glass* v. *Blackwell*, 48 Ark. 50.

JUDGMENTS — FOREIGN — WHEN THEY MAY BE COLLATERALLY ATTACKED. — A foreign judgment obtained without jurisdiction of the person of the defendant may be attacked directly or collaterally: *Thorn* v. *Salmonson*, 37 Kan. 441; *Stone* v. *Wainwright*, 147 Mass. 201.

JUDGMENT — RES JUDICATA. — A final decree or judgment is conclusive upon all the parties in respect to all matters determined by it, and as to all matters which the parties were bound to litigate and bring to a decision:

Berry v. *Whidden*, 62 N. H. 473; *Wolverton* v. *Baker*, 86 Cal. 591; *Smith* v. *Walker*, 77 Ga. 289; *Lowry* v. *Davenport*, 80 Ga. 742; *Keokuk etc. Co.* v. *Keokuk*, 80 Iowa, 137; *Weber* v. *Mick*, 131 Ill. 521; *Sanders* v. *Peck*, 131 Ill. 408; *Culver* v. *Phelps*, 130 Ill. 217; *Howe* v. *Lewis*, 121 Ind. 110; *Ashmead* v. *Hurt*, 125 Ind. 566; *Lieb* v. *Lichtenstein*, 121 Ind. 483; *Nickless* v. *Pearson*, 128 Ind. 477; *Seiler* v. *Bank etc.*, 86 Ky. 123; *Succession of Duhé*, 42 La. Ann 253; *Eastin* v. *Board etc.*, 40 La. Ann. 705; *Fuller* v. *Eastman*, 81 Me. 284, *Guilford* v. *Western etc. Co.*, 43 Minn. 434; *Murphy* v. *De France*, 101 Mo. 152; *Burke* v. *Perry*, 26 Neb. 414; *Phillips* v. *Pullen*, 45 N. J. Eq. 831; *Campbell etc. Mfg. Co.* v. *Walker*, 114 N. Y. 7; *Allen* v. *Salinger*, 103 N. C. 15; *Peck* v. *Culberson*, 104 N. C. 425; *Stuart* v. *Heiskell*, 86 Va. 191; *Jourolman* v. *Massengill*, 86 Tenn. 81; *Huntley* v. *Holt*, 59 Conn. 102; 21 Am. St. Rep. 71, and note. But the judgment does not bind persons not parties, or their privies, and binds no persons as to matters not litigated or in issue: *Ernst Bros.* v. *Hogue*, 86 Ala. 502; *McWhorther* v. *Andrews*, 53 Ark. 307; *Schuster* v. *Rader*, 13 Col. 330; *Florida Southern etc. R. R. Co.* v. *Brown*, 23 Fla. 106; *Henderson* v. *Fox*, 80 Ga. 479; *Livingston* v. *Marshall*, 82 Ga. 281; *Lindley* v. *Snell*, 80 Iowa, 104; *Carson etc. Co.* v. *Knapp*, 80 Iowa, 617; *Wilson* v. *Brookshire*, 126 Ind. 497; *Telford* v. *Garrels*, 132 Ill. 551; *Simms* v. *Simms*, 88 Ky. 642; *Deal* v. *Schlomberg*, 20 Nev. 330; *Tribble* v. *Perry*, 28 S. C. 566.

WATTS *v.* SWEENEY.

[127 INDIANA, 116.]

MECHANIC'S LIEN. — A mechanic to whom any article is intrusted to alter or repair, and who furnishes material and labor in its alteration and repair, has a lien thereon which is enforceable under sections 5303 and 5304 of the Revised Statutes of Indiana.

MORTGAGE AND MECHANIC'S LIEN, PRECEDENCE BETWEEN. — If the mortgagee of a railway and the rolling stock thereon permits a locomotive and tender to remain in the possession and use of the mortgagor, and through such use it becomes in need of alterations and repairs, whereupon it is intrusted to a mechanic to alter and repair, he has a lien thereon for the amount due him which has precedence over such mortgage.

IF A MORTGAGEE OF MACHINERY UPON WHICH, THROUGH USE, repairs and alterations will become necessary leaves it in the possession of the mortgagor to be used by him, it will be presumed that they contemplated that repairs thereon would become necessary, and that the mortgagor was authorized, if necessary, to intrust it to a mechanic for repairs; and when it is so intrusted, the mechanic has a lien thereon paramount to the lien of the mortgage for materials and labor furnished in such repairs.

PRACTICE. — If a party has filed an answer in bar, he cannot afterwards file an answer in abatement even by leave of the court.

QUIETING TITLE TO PERSONALTY. — Though an original action cannot be maintained to quiet title to personal property, yet when an action is commenced to foreclose a mortgage thereon, one who is made a party defendant may, by a cross-complaint, set up his title to the property, and ask to have his ownership declared and the foreclosure enjoined; and having done so, he cannot be deprived of his right to have his ownership declared by a dismissal of the case as to him.

W. N. Tracewell and R. J. Tracewell, for the appellants.

M. Z. Stannard, for the appellees.

OLDS, C. J. On September 12, 1883, the Louisville, New Albany, and Corydon Railway Company, for the purpose of securing the payment of its negotiable bonds and interest coupons thereto attached, executed to appellant a mortgage upon its real estate, its road, and its equipments, including an engine called the Samuel J. Wright, which mortgage was, on said day, recorded in the office of the recorder of Harrison County, Indiana, in record No. 12. On August 4, 1887, appellant filed in the Harrison circuit court his complaint for the foreclosure of the mortgage, making defendants to said action, among others, the appellees Sweeney and Sweeney. Appellees Sweeney and Sweeney filed an answer to the complaint, and also filed a cross-complaint. Appellant then dismissed his complaint as to Sweeney and Sweeney. Issues were joined between appellees and appellant Watts, trustee, upon the cross-complaint, and a trial was had, and judgment rendered upon the cross-complaint in favor of the appellees.

The following errors are assigned: 1. That the court erred in overruling the separate demurrer of the appellant to the first paragraph of the cross-complaint of the appellees; 2. The court erred in sustaining the demurrer of the appellees to the plea in abatement filed by appellant to the cross-complaint of the appellees; 3. The court erred in sustaining the demurrer of the appellees to the second paragraph of the separate answer of the appellant to the cross-complaint of appellees; 4. The court erred in overruling the separate motion of appellant to separately docket and try the cross-complaint of appellees; 5. The court erred in overruling the motion by appellant for a new trial on appellees' cross-complaint; 6. The cross-complaint of appellees does not contain sufficient facts to constitute a cause of action against appellant.

It is alleged in the cross-complaint "that on the fifteenth day of May, 1885, and for three years prior thereto, and ever since said date, the appellees Sweeney and Sweeney were, and had been, engaged under the firm name of M. A. Sweeney and Brother, in running and operating a foundry and machine-shop at the city of Jeffersonville, county of Clark, and state of Indiana, for the purpose of building and repairing engines, locomotives, and other machinery for railroad companies, steamboat companies, and the general public; that they admit the exe-

cution of the mortgage to the plaintiff in trust, as in his complaint herein set forth and declared, and that the same was for the uses and purposes therein mentioned. It is further admitted that the conditions of said mortgage were broken by non-payment of interest upon the bonds referred to and secured thereby and at the time therein set out, and that then and there, and by reason thereof, the plaintiff became entitled to the possession of all the personal property covered by said mortgage, including the said engine and tender number one (1), and named the Samuel J. Wright; but the defendants aver that notwithstanding the premises, the plaintiff permitted their co-defendant, the Louisville, New Albany, and Corydon Railway Company, the mortgagor thereof, to continue to hold, use, and operate the railroad, machinery, and rolling stock named in said mortgage (including said engine and tender), for a long time after the same became forfeited as aforesaid, to wit, for more than two years thereafter; that during all of said time, by the consent of the plaintiff, and to enable said mortgagor to pay the principal and interest of the debt secured by said mortgage, their said co-defendant was allowed to remain so in possession and control of and operate the said railroad, and to run the said locomotive-engine and tender; that by reason of such use of said engine and tender in the manner and for the purposes aforesaid, the same became worn out, broken, out of repair, and of no service to the plaintiff or said mortgagor, for the purpose aforesaid, and in order to render said engine and tender fit for use, the same being then and there the only locomotive-engine and tender owned by the plaintiff or said mortgagor, and to be used in operating said mortgaged railroad, and thereby to earn the means of liquidating said debt and interest, repairs became necessary thereto; that said Louisville, New Albany, and Corydon Railway Company, while so possessing and operating said railroad, locomotive-engine and tender, intrusted the said engine and tender to the appellees as machinists and mechanics at their said place of business, at the said city of Jeffersonville, to the end that the same might be by the said firm, as such mechanics, overhauled, repaired, altered, remodeled, and rendered fit for use; that while said engine and tender were so intrusted to them and under their care and control, and in their custody for the purposes aforesaid, they, as such firm, at the special instance and request of said mortgagor, expended and bestowed a large amount of money, to wit, $1,163.56, in providing mate-

rial and labor in and about the necessary repairs, refitting and rendering fit for service the said engine and tender, thereby imparting increased value thereto in said sum; that the repairs so made by these cross-complainants were necessary to be done, and the amount so expended was a reasonable charge for such repairs."

It is further averred "that long before the commencement of this suit the said repairs upon said engine and tender were completed, and their said reasonable charge for the same became then and there due, yet the same was not paid, and said engine and tender taken away, nor were said charges paid or tendered to said cross-complainants, or any one for them; that the said charges for said repairs became due and payable to these cross-complainants on the fifteenth day of July, 1885; that after six months had elapsed from said last-named date, to wit, on the twenty-seventh day of March, 1886, these cross-complainants, for the purpose of paying and satisfying their said charges, the same not having previously been paid, sold the said locomotive-engine and tender at public auction on Pearl Street, between Court Avenue and Maple Street, in the city of Jeffersonville, Clark County, state of Indiana, for cash, at the hour of ten o'clock, A. M., on the twenty-seventh day of March, 1886, the same not being susceptible of division without injury thereto; that said articles exceeded in value the sum of ten dollars, and before making said sale said cross-complainants, as such mechanics, gave public notice of the time, place, and terms thereof by advertisement for three weeks successively next before said sale, in the National Democrat, a weekly newspaper of general circulation, printed and published in said county of Clark, the same being the county in which said articles were so repaired and sold; that said cross-complainants, being the highest and best bidders therefor, became the purchasers of the said engine and tender, and have ever since said time owned, held, and possessed the same in pursuance of said sale and purchase; that said plaintiff and the cross-complainants' co-defendant each claim to own some interest in said property by virtue of a mortgage filed with plaintiff's complaint and sought to be foreclosed in this action, a copy of which is filed herewith, made a part hereof, and marked 'Exhibit A'; but these cross-complainants allege that neither said plaintiff nor their co-defendant has any interest whatever therein nor title thereto, and that their said claim and pretense cast a cloud upon the title of these cross-

complainants to said property, and materially interfere with their use and enjoyment thereof, and prevent them from selling and disposing of the same. Wherefore these cross-complainants pray that the said cloud be removed from their title to said property, and their title quieted therein; that plaintiff may be enjoined from foreclosing its said mortgage herein upon said engine and tender, and for such other and necessary relief in the premises as the nature and circumstances of this case may require."

The first question presented upon the facts alleged in the cross-complaint is as to the priority of the lien of the appellees over that of the mortgagee. The appellees had a lien upon the property for the materials furnished and labor performed in making the repairs; this they would have had at common law, but the same lien which they had at common law is declared, and a method for its enforcement provided, by sections 5304 and 5305, Revised Statutes of 1881.

This section is very awkwardly worded. It provides that "whenever any person shall intrust to any mechanic or tradesman materials to construct, alter, or repair any article of value," etc. It is a remedial statute, and must be construed liberally, and a reasonable construction of it is, that it was intended to apply to cases where articles of value are intrusted to a mechanic or tradesman to alter or repair; and, indeed, literally construed, it would apply to the case under consideration, for the engine and tender were intrusted to the appellees to alter and repair; and when so altered and repaired, the engine and tender so intrusted to them were a part of the material which entered into and constituted a part of the same as repaired. This section does not declare a lien, but provides the manner of enforcing a lien which the mechanic has at common law, and it would be an imputation upon the intelligence of the legislative body enacting the section to hold that it was only intended to apply to a case where materials were furnished to alter or repair an article of value, and that it does not apply where the mechanic is intrusted with the article to be altered or repaired, furnishing his own materials for the repairs, in view of the fact that there is no other statute relating to such a case. The rights of the appellees are therefore governed by sections 5304 and 5305, Revised Statutes of 1881, in enforcing their lien.

The case presented by the cross-complaint shows the engine repaired was mortgaged with the other equipments of

the railroad; that it was the only engine belonging to the mortgagor and used in operating the railroad, and by the terms of the mortgage was left in the possession of the mortgagor, and after the debt became due it was still permitted by the mortgagee to remain in the possession of the mortgagor, to be used by him in operating the railroad and earning the money to pay the mortgage debt; and that by virtue of such use it became worn, out of repair, and unfit for use, and was by the mortgagor in possession, long after the debt matured, and after there was a forfeiture of the conditions in the mortgage, intrusted to the appellees to repair. Under such circumstances the necessary implication was, and the fair presumption is, that the engine thus mortgaged, but retained by the mortgagor to be used by him in earning money to pay the mortgage debt, was to be kept in repair; and the further presumption follows, that it being machinery requiring skilled mechanics and machinists to repair, it would be intrusted to machinists to make necessary repairs, and such being the understanding of the parties to the mortgage, as fairly inferred from the nature of the machinery and use to be made of it, and by permitting it to be retained and used by the mortgagor long after the mortgage debt matured and the conditions of the mortgage forfeited, the mortgagee was bound to know that such mechanic or machinist would have a lien for the amount of the repairs.

When the mortgagee intrusts machinery of the character in controversy to the custody of the mortgagor for a long period of time, to be used by the mortgagor in operating the railroad, it will be presumed against the mortgagee that all necessary repairs were contemplated, and the mortgagor was, in case of needed repairs, constituted the agent of the mortgagee in procuring such repairs, and in such case equity gives the mechanic a lien for his services and materials. The repairs add to the value of the property, and they are for the benefit of the mortgagee as well as the mortgagor.

Where property is to be retained and used by the mortgagor for a long period of time, it will be presumed to have been the intention of the parties to the mortgage, where it is property liable to such repairs, that it is to be kept in repair; and when the property is machinery, or property of a character which renders it necessary to intrust it to a mechanic or machinist to make such repairs, the mortgagor in possession will be constituted the agent of the mortgagee to procure the

repairs to be made; and as such necessary repairs are for the betterment of the property, and add to its value to the gain of the mortgagee, the common-law lien in favor of the mechanic for the value of the repairs is paramount and superior to the lien of the mortgagee. The mortgagee is presumed, in such case, to have contracted with a knowledge of the law giving to a mechanic a lien.

Where the lien is purely a statutory one, or where the property is of such a character that it would not be reasonable to anticipate the necessity for any needed repairs for the period of time the property is to or does remain in the possession of the mortgagor, or when it is but reasonable to expect the mortgagor in person to care for or repair the property,—in such cases, a different rule may prevail.

In the case of *Hanch* v. *Ripley*, 127 Ind. 151, it was held that the lien of an agister for feeding horses was not superior to a chattel mortgage; but the agister is given a lien by statute, and it would be the natural presumption that if the mortgagor retained the possession of horses or live-stock, he was to feed and care for the same.

In Jones on Chattel Mortgages, 2d ed., section 473, it is said: "Where the subject of a mortgage was a hack let for hire, and it was described as 'now in use' at certain stables, and it was stipulated that the mortgagor might retain possession and use it, it was regarded as the manifest intention of the parties that the hack should continue to be driven for hire, and should be kept in a proper state of repair for that purpose, not merely for the benefit of the mortgagee, but for that of the mortgagor also, by preserving the value of the security and affording a means of earning wherewithal to pay off the mortgage debt"; and this is the holding in the case of *Hammond* v. *Danielson*, 126 Mass. 294.

It is the recognized rule that when the mortgagee of a ship allows the mortgagor to continue in possession as the apparent owner, making it a source of profit wherewithal to pay off the mortgage debt, the mortgagor has the implied right to do all that is necessary to keep the ship in repair, and it is inferred that he has the right to procure such repairs to be made on the usual and ordinary terms, and such terms give the shipwright a lien for the work done and the labor expended: Jones on Chattel Mortgages, sec. 535; *The De Smet*, 10 Fed. Rep. 483, and note on p. 489; *Scott* v. *Delahunt*, 65 N. Y. 128. See, on question of liens, *Jackson* v. *Cummins*, 5 Mees. & W. 341.

In 1 Jones on Liens, section 744, the doctrine is stated to be, that the mortgagor's authority for the creation of a lien on the mortgaged property may be implied from the mortgagor being allowed to remain in possession of the chattel; and the lien of the mechanic is prior to the lien of the mortgagee.

The averments of the complaint show that section 5305 was fully complied with in making the sale. Notice was published in accordance with the requirements of said section, and a sale made in accordance with the sections; a sale under sections 5304 and 5305 passes a complete title to the property to the purchaser. There was no error in overruling the demurrer to the complaint.

The next question presented is as to the ruling of the court on the demurrer to the appellant's plea in abatement. This plea shows that prior to the commencement of this action appellant had filed his complaint in the circuit court of the United States for the district of Indiana against the appellees in replevin, alleging that the appellant had a special property in the engine and tender by reason of the mortgage, and was entitled to the possession of the same by reason of the failure to comply with the conditions of the mortgage; and the appellees had alleged in their answer in said cause the same service performed on the engine and tender, the sale, and that they were the owners, alleging in said answer the same facts set up in their cross-complaint in this action, and that said cause was pending at the time of the commencement of this action and the filing of the cross-complaint, and is still pending; also, alleging other formal matters showing that the United States court had jurisdiction in said action of replevin. The appellant first appeared to the cross-complaint, and filed an answer in bar, and then, with leave of court, withdrew the answer in bar, and filed an answer in abatement.

That when a party first files an answer in bar he cannot afterwards file an answer in abatement, even by leave of court, has been settled by a decision of this court in the case of *Brink v. Reid*, 122 Ind. 257; and having been so held, and the statute, section 365, Revised Statutes of 1881, providing that answers in abatement must precede and cannot be pleaded with an answer in bar, we deem it best to adhere to the decision in that case. Pleas in abatement being dilatory pleas, a strict rule should be held in regard to them. The answer in abatement in this case having been filed after the filing of an an-

swer in bar, the same was subject to be struck out on motion. The same result was reached by sustaining a demurrer thereto, and there is no available error in the ruling.

The next alleged error discussed is the ruling of the court in sustaining appellees' demurrer to the second paragraph of appellant's answer.

This paragraph disclaims any intention on the part of appellant to affect in any way the appellees by the foreclosure of the mortgage, and states facts showing that the engine and tender were personal property in the hands of the appellees.

It is contended that this paragraph of answer is good, for the reason that the appellees, having the possession, cannot maintain a suit to determine and quiet their title. However this may be as to maintaining an independent suit, in this case the appellant, in his complaint, sought a foreclosure of his mortgage upon the engine, and the appellees were made parties to the suit, and filed their cross-complaint, asking to have their ownership declared, and to enjoin and prevent a foreclosure against them as to the engine and tender. After the filing of the cross-complaint, appellant dismissed his case as to the appellees. This did not take appellees' cross-complaint out, and the appellees had the right to have their title to the property settled and determined as between them and the mortgagee.

The facts alleged in the cross-complaint entitled the appellees to some relief, and the answer did not state facts showing they were not entitled to any. No objection is made as to the form of the judgment.

The next objection urged relates to the ruling of the court on the motion to separately docket and try the case on the cross-complaint; but it is conceded that this was a matter within the discretion of the trial court, and not a matter to which the appellant was entitled as of right. There was no error in this ruling.

The next question presented arises on the ruling of the court in overruling the motion for a new trial. It is contended that the evidence as to the notice and sale of the engine and tender was improperly admitted, for the reason that such sale was unauthorized. This objection is not well taken. The statute authorized the sale.

Lastly, it is urged that the evidence does not support the

finding. There is sufficient evidence to support the finding, and in such a case it will not be disturbed by this court.

There is no error in the record.

Judgment affirmed, with costs.

MECHANIC'S LIEN — SERVICES. — An artisan who has bestowed his labor upon property held by him as bailee has a lien thereon for the value of his services: *Grinnell* v. *Cook*, 3 Hill, 485; 38 Am. Dec. 663, and note; *Arians* v. *Brickley*, 65 Wis. 26; 56 Am. Rep. 611; note to *McIntyre* v. *Carver*, 37 Am. Dec. 522, 523; *Phillips* v. *Freyer*, 80 Mich. 254; *Boyce* v. *Poore*, 84 Ga. 574. A laborer's general lien on personal property takes precedence over ordinary mortgages, even those created prior to the contract for labor: *Allred* v. *Haile*, 84 Ga. 570. A mechanic's lien is superior to the landlord's lien for rent, as well as to a chattel mortgage placed upon the improvements after they are made, but before proceedings are instituted to establish the mechanic's lien: *National L. Co.* v. *Bowman*, 77 Iowa, 706. But the lien of a chattel mortgage upon a horse is superior to the subsequently acquired statutory lien of a livery-stable keeper, even though the latter had no knowledge of the existence of the mortgage: *McGhee* v. *Edwards*, 87 Tenn. 506. *Contra*, *Smith* v. *Stevens*, 36 Minn. 303. The *bona fide* purchase of personalty in payment of an antecedent debt, prior to its seizure under a laborer's lien, will take precedence over such lien, no notice thereof having been brought home to the purchaser: *Forbes* v. *Chisholm*, 84 Ga. 641.

CARR *v.* STATE.

[127 INDIANA, 204.]

A STATE ENTERING INTO CONTRACTS lays aside its attributes of sovereignty, and binds itself, substantially, as one of its citizens does when he enters into a contract.

CONTRACTS OF A STATE ARE INTERPRETED as the contracts of individuals are, and controlled by the same laws.

A STATE HAS NO POWER TO ANNUL OR IMPAIR ITS OWN CONTRACT. Its legislature may, by failing to make an appropriation, defeat the payment of a just claim or block the wheels of government, but it has, under the constitution, no right to do so.

BETWEEN A CONTRACT OF THE STATE AND ONE OF ITS CITIZENS THERE IS THIS DIFFERENCE, that the latter cannot defeat the enforcement of a contract, while the former may, because not liable to suit without its consent, and not compellable to make appropriations to provide means of payment.

CREDITORS ACCEPTING OBLIGATIONS OF THE STATE ARE BOUND TO KNOW that they cannot enforce their claims against the state directly, nor against its officers, when no appropriation has been made as the constitution requires.

IF NO APPROPRIATION HAS BEEN MADE TO PAY A DEBT OF A STATE, NO ACTION CAN LIE AGAINST THE OFFICERS OF THE STATE THEREON. Unless there is an appropriation, courts have no power to enforce a contract of a state, though they do not doubt its validity.

APPROPRIATION. — PROMISE TO PAY A DEBT OF A STATE, contained in a certificate thereof issued by its authority, is not an appropriation.

APPROPRIATION NEED NOT BE MADE IN EXPRESS TERMS. It is sufficient that an intention to make it is clearly evinced by the language of the statute, or that no effect can be given to the statute unless it is considered as making the necessary appropriation.

APPROPRIATION FOR PAYMENT OF SALARY. — If the salary of a public officer is fixed and the times of payment prescribed by law, no special appropriation is necessary to authorize the issuing of a warrant for its payment.

APPROPRIATION. — IF A STATUTE SETS APART THE MONEYS IN THE STATE DEBT SINKING FUND for the payment of the principal of certain indebtedness of the state, this is a valid appropriation; and if that statute is afterwards abrogated by another statute, declaring that the state sinking fund shall be discontinued, merged in, and constitute part of the general fund, and all sums of money payable out of the state sinking fund shall be payable out of the general fund of the state treasury, this latter statute is also an appropriation.

CONTRACT LAW CHANGING PLACE OF PAYMENT. — The holder of a certificate of indebtedness payable at a designated place cannot be deprived of his rights by a subsequent law or order making it payable elsewhere, and declaring if it is not there presented for payment interest thereon shall cease. The only method in which a debtor can escape liability is by having money ready for the creditor at the place of payment named in the contract.

CONSTITUTIONAL LAW. — A STATUTE CANNOT BE CHANGED OR REPEALED BY A SUBSEQUENT ACT WHICH IS VOID because unconstitutional. An unconstitutional act can neither tear down nor build up, neither create new rights nor destroy existing ones.

CONSTITUTIONAL LAW. — STATUTE ATTEMPTING TO WITHDRAW AN APPROPRIATION BY ANNULLING A CONTRACT cannot accomplish such purpose, because the legislature has no power to annul contracts.

INTEREST, WHEN DUE ON A CONTRACT OF THE STATE. — If a statute authorizes the issue of certificates for the payment of the principal and interest to which the faith of the state is pledged, and declares that the interest shall be paid half-yearly at the city of New York, but that if interest is not demanded before the expiration of thirteen months after it falls due then it shall be demandable only at the treasury of the state, such certificates bear interest to their maturity.

INTEREST. — A SOVEREIGN IS NOT BOUND TO PAY INTEREST unless it has contracted so to do.

RATE OF INTEREST ON CONTRACTS OF THE STATE AFTER THEIR MATURITY is the rate mentioned in the statute authorizing such contracts, and not the rate specified in the general statutes of the state giving interest on contracts.

INTEREST ON INTEREST IS NOT ALLOWABLE ON A CONTRACT OR OBLIGATION OF A STATE, unless it has expressly promised to pay such interest.

APPROPRIATION TO PAY THE PRINCIPAL AND INTEREST OF A BOND of a state does not authorize the payment of interest upon interest.

A. G. Smith, attorney-general, and J. H. Gillett, for the appellants.

I. P. Gray and P. Gray, for the appellee.

ELLIOTT, J. The legislature of the state, in 1846 and 1847, passed laws providing for the funding and payment of the public debt. Those acts authorized the auditor and treasurer of the state to execute certificates pledging the irrevocable faith of the state to the payment of the sum named in each of the certificates. Among the certificates issued were those upon which this action is founded. They are dated the third day of May, 1852, and are payable at the pleasure of the state at any time after twenty years from the nineteenth day of January, 1846. They provide for the payment of interest semi-annually, at the rate of five per centum per annum; the days of such semi-annual payments are designated as the first days of January and July in each year. The payee of the certificates is described as Jean Baptiste Maurice du Coetlosquet, of Paris, and provision is made for the registry of the certificates. The place of payment of principal and interest is declared to be the city of New York.

No question is made as to the validity of these certificates, nor could any be successfully made. The certificates were issued under valid legislative authority, and in accordance with duly enacted laws. There is therefore a complete and binding contract; no element is wanting, nor is any incident absent.

As there is a perfect contract, the state is bound to perform it according to its legal tenor and effect, and to redeem the pledge it has declared to be irrevocable. In entering into the contract it laid aside its attributes as a sovereign, and bound itself, substantially, as one of its citizens does when he enters into a contract. Its contracts are interpreted as the contracts of individuals are, and the law which measures individual rights and responsibilities measures, with few exceptions, those of a state, whenever it enters into an ordinary business contract: *Hartman* v. *Greenhow*, 102 U. S. 672; *Poindexter* v. *Greenhow*, 114 U. S. 270; *Keith* v. *Clark*, 97 U. S. 454; *Murray* v. *Charleston*, 96 U. S. 432; *Gray* v. *State*, 72 Ind. 567; *State* v. *Cardozo*, 8 S. C. 71; 28 Am. Rep. 275; *People* v. *Canal Comm'rs*, 5 Denio, 401; *Georgia etc. Co.* v. *Nelms*, 71 Ga. 301; *Lowry* v. *Francis*, 2 Yerg. 534; *Grogan* v. *San Francisco*, 18 Cal. 590.

The principle that a state, in entering into a contract, binds itself, substantially, as an individual does under similar circumstances necessarily carries with it the inseparable and subsidiary rule that it abrogates the power to annul or impair its own contract. It cannot be true that a state is bound

by a contract, and yet be true that it has power to cast off its obligation and break its faith, since that would involve the manifest contradiction that a state is bound and yet not bound by its obligation. It may have the might and means of defeating the enforcement of a contract, yet, in a just sense, have no power to do so. Might and opportunity do not constitute power in the true sense; to constitute power, another element must be present, and that element is right. If right is absent, there is no power. Legislatures may, by a failure to make an appropriation, defeat a just claim, or, indeed, block the wheels of government; but under the constitution they have no power to do any such thing. It seems very clear, therefore, that there is no constitutional power to annul or impair a valid contract entered into by a state, and so it has long been settled: *Fletcher* v. *Peck*, 6 Cranch, 87; *Terrett* v. *Taylor*, 9 Cranch, 43; *Trustees etc. Co.* v. *Beers*, 2 Black, 448; *Davis* v. *Gray*, 16 Wall. 203; *Hall* v. *Wisconsin*, 103 U. S. 5; *People* v. *Platt*, 17 Johns. 195; *Montgomery* v. *Kasson*, 16 Cal. 189; *State ex rel.* v. *Barker*, 4 Kan. 379; 96 Am. Dec. 175.

There is one essential and far-reaching difference between the contracts of citizens and those of sovereigns, not, indeed, as to the meaning and effect of the contract itself, but as to the capacity of the sovereign to defeat the enforcement of its contract. The one may defeat enforcement, but the other cannot. This result flows from the established principle that a state cannot be sued: *Hans* v. *State*, 24 Fed. Rep. 55. Nor is this the only method under such a constitution as ours by which a state may defeat the enforcement of its obligation, for the failure to make the necessary appropriation will effectually accomplish that object: *State ex rel.* v. *Porter*, 89 Ind. 260; *May* v. *Rice*, 91 Ind. 546; *Rice* v. *State ex rel.*, 95 Ind. 33. The legislature has therefore the ability to avoid payment of the obligations of the state by a failure or refusal to make the necessary appropriation, although that body cannot impair the obligation of the contract. Creditors who accept the obligations of a state are bound to know that they cannot enforce their claims by an action against the state directly, nor by an action against its officers, where no appropriation has been made as the constitution requires. If, however, there is an effective appropriation, then an officer whose duty it is to draw a warrant upon the fund set apart by statute may be coerced into a performance of that duty: *Gray* v. *State ex rel.*, 72 Ind. 567. But there is no power that can coerce the legislature into

making an appropriation, no matter how strong the justice of the creditor's claim, nor how plain the duty seems. Neither directly nor indirectly can such a result be accomplished; hence it is that where there is no statute making an appropriation no action will lie against the officers of the state: *State* v. *Stanton*, 6 Wall. 50; *Hans* v. *State*, 24 Fed. Rep. 55. Whether an appropriation shall or shall not be made is a legislative question, and over purely legislative questions the courts have no supervision or control. A question of that character is beyond the touch of the judiciary, for one department of government cannot enter the domain of another: *Smith* v. *Myers*, 109 Ind. 1; 58 Am. Rep. 375, and authorities cited; *State ex rel.* v. *Haworth*, 122 Ind. 462, and authorities cited; *Wilson* v. *Jenkins*, 72 N. C. 5; *Goddin* v. *Crump*, 8 Leigh, 154; *Burch* v. *Earhart*, 7 Or. 58; *Franklin* v. *State Board etc.*, 23 Cal. 173; *People* v. *Pacheco*, 27 Cal. 175.

The right of the relator to compel the auditing and payment of his claim must, it is evident, depend upon whether there is an appropriation upon which a warrant can be rightfully drawn, and out of which it can be lawfully paid; for if there is no such appropriation, the courts are powerless to assist him to enforce his contract, although they may not doubt its validity.

It is clear, upon authority, that the promise to pay, contained in the certificate, is not an appropriation: *Ristine* v. *State ex rel.*, 20 Ind. 328; *State ex rel.* v. *Ristine*, 20 Ind. 345; *Newell* v. *People*, 7 N. Y. 9; *Sunbury etc. R. R. Co.* v. *Cooper*, 33 Pa. St. 278.

It does not, however, follow that because no claim can be enforced where there is no appropriation, the appropriation must be made in a particular form or in express terms. It is sufficient if the intention to make the appropriation is clearly evinced by the language employed in the statutes upon the subject, or if it is evident that no effect can possibly be given to a statute unless it be construed as making the necessary appropriation. In *Ristine* v. *State ex rel.*, 20 Ind. 328, it was said: "An appropriation of the money to a specified object would be an authority to the proper officers to pay the money, because the auditor is authorized to draw his warrant upon an appropriation, and the treasurer is authorized to pay such warrant if he has appropriated money in the treasury. And such an appropriation may be prospective; that is, it may be made in one year, of the revenues to accrue in another or future

years, the law being so framed as to address itself to such future revenues. So a direction to the officers to pay money out of the treasury upon a given claim, or for a given object, may, by implication, include in the direction an appropriation." The point affirmed in the case of *Reynolds* v. *Taylor*, 43 Ala. 420, is thus stated by the reporter: "If the salary of a public officer is fixed, and the times of payment prescribed by law, no special annual appropriation is necessary to authorize the auditor to issue his warrant for its payment." To the same effect is the decision in *Nichols* v. *Comptroller*, 4 Stew. & P. 154. The same principle was asserted in a case where the constitution, in general terms, provided what salary should be paid a public officer: *Thomas* v. *Owens*, 4 Md. 189. That case was followed and approved in the case of *Green* v. *Purnell*, 12 Md. 329. In the fully considered case of *State ex rel.* v. *Hickman*, 10 Mont. 497, the doctrine of the Maryland cases was approved and enforced. A similar doctrine was declared in the case of *State ex rel.* v. *Weston*, 4 Neb. 216. The question as to what constitutes an appropriation was discussed by Field, C. J., in *McCauley* v. *Brooks*, 16 Cal. 11, 28, in an able opinion, and it was there said: "To an appropriation within the meaning of the constitution, nothing more is requisite than a designation of the amount, and the fund out of which it shall be paid. It is not essential to its validity that the funds to meet the same should be at the time in the treasury. As a matter of fact, there have seldom been in the treasury the necessary funds to meet the several amounts appropriated under the general appropriation act of each year." It is evident from these authorities that an appropriation may be implied, and the debatable question is, What provisions are sufficient to create such an implication? To determine this question, it is necessary to examine the legislative enactments subsequent to those under which the bonds were issued, and from them ascertain whether an appropriation has been made. The decisions in the cases of *Ristine* v. *State ex rel.*, 20 Ind. 328, and *State ex rel.* v. *Ristine*, 20 Ind. 345, declare that the acts of 1846 and 1847 did not make the requisite appropriation, and hence we must search for it elsewhere.

While it is true that the acts of 1846 and 1847 cannot, under the decisions referred to, be considered as making an appropriation, still they do exert some influence upon the question, and cannot pass unheeded. They do pledge the faith of the state to the payment of the debt, and do provide

that the certificates, together with the interest thereon, shall be paid out of the state revenues: Acts of 1847, p. 1. Independently of any provision of this character, the presumption is, and ought to be, that the state meant to pay its debt; for the law, as well as equity, imputes an intention to fulfill an obligation. In justice a state has no right to repudiate its contract, either directly or by indirection, and no such purpose should be imputed to it. In *McCauley* v. *Brooks*, 16 Cal. 11, it was said: "We deny both the right to repudiate and the fact of repudiation. The state possesses no such right, but upon her rests the same obligations to do justice and keep faith as rest upon individuals." In view of the provisions of the act of 1847 and of the general principles of equity and justice, the courts must assume, unless a contrary intention is clearly manifested, that the state did not intend to defeat its creditors by direct or indirect measures; hence we must assume in the construction of subsequent statutes (unless to make this assumption violates the language employed) that the state meant to make good its declaration in the act of 1847, and perform the promise contained in the contract of 1852. A series of acts, extending over a period of many years, shows an intention to provide means for the payment of the state debt, for various statutes provide measures for raising money to pay the certificates issued to the creditors of the state under the acts of 1846 and 1847: 1 Rev. Stats. 1852, p. 408; Acts of 1861, p. 107; Acts of 1871, p. 6.

It is unnecessary to refer to all of those acts, but of two of them it is necessary to speak with some particularity. In 1865 an act was passed wherein it was declared that it was the purpose of the general assembly to provide for the prompt payment of the bonds or certificates issued under the acts of 1846 and 1847, and in that act duties concerning the payment of such evidences of indebtedness were imposed upon certain of the state officers: Acts of 1865 (Special Sess.), p. 49. That act contains, among others, this provision: "All the money and funds properly belonging to either of said funds shall be denominated the State Debt Sinking Fund, and all such moneys are hereby set apart for the payment of such principal exclusively, and shall not, under any circumstances, be drawn or paid out of the state treasury for any other purpose whatever." This provision, taken in connection with other provisions of the act, so clearly makes an appropriation that there is no room for controversy, much less neces-

sity for amplification. So far we encounter no difficulty; but such difficulties as we do encounter arise out of the act of December 13, 1872. The third section of that act reads thus: —

"Sec. 3. That the state debt sinking fund as a separate fund of the state treasury be discontinued from and after the first day of February, A. D. 1873, and be merged in and constitute a part of the general fund of said treasury, and all sums of money or claims now lawfully payable out of the said state debt sinking fund shall, after the date last aforesaid, be payable out of the general fund of the state treasury."

This provision, even if it stood alone, must be regarded as making an appropriation within the meaning of the constitution; but if it were true that there might be doubt if the provision were isolated from all others and considered in itself, there can possibly be none when it is considered, as it must be, in connection with the prior statute and under the rules of the law we have stated; so that if there is no valid provision in other sections of the act of 1872 contravening that contained in section 3, it must be held that there was a valid appropriation. If there is a provision destroying the appropriation, it must be that contained in the first section of the act of 1872, since no other act professes to annul the appropriation. That section reads thus: "That the said action of the said board of state debt of sinking-fund commissioners, in stopping the interest on the two and a half and five per cent certificates of state stocks, as aforesaid, is hereby ratified and approved, and that from and after the first day of February, A. D. 1873, the principal of such of said certificates as are still outstanding, with the interest that may have accrued thereon prior to the stoppage of interest thereon, as aforesaid, shall be payable at the treasury of the state, and not elsewhere."

To understand this section it is necessary to quote one paragraph of the preamble of the act, and to mention what action of the sinking-fund commissioners it refers to. The paragraph of the preamble to which we refer reads as follows: "And whereas the board of state debt sinking-fund commissioners of this state, on or about the first day of September, 1870, stopped the payment of interest on all the two and a half and five per cent certificates of state stocks then outstanding, because of their non-presentment for payment, due notice having been given requiring their presentment for payment at the state agency in the city of New York, where the money

was on deposit to redeem them." The action of the sinking-fund commissioners to which reference is made consisted in ordering a presentment for payment, and in giving notice by publication that unless the certificates were presented within a given time interest should cease. If the provisions of section 1 are valid, there is no appropriation; but if they are invalid, the appropriation made by the act of 1865 has not been annulled, since the effect of section 3 of the act of 1872 is to continue the appropriation; the only change made is in charging the general fund instead of the state debt sinking fund. That the appropriation as to the principal continued in force admits of no debate, and our judgment is, that there is little doubt that it continues in force as to the interest promised to be paid by the state.

The board of sinking-fund commissioners had no authority to alter or abrogate the contract made in 1852, nor to impair it in any material particular, for no statute assumed to confer upon them any such power. Into that contract the law entered, as it does into every contract, as an important factor: *Long* v. *Straus*, 107 Ind. 94; 57 Am. Rep. 87; *Coggeshall* v. *State*, 112 Ind. 561. The elements of law embodied in a contract are as unchangeable as the elements of fact. The rights flowing from a contract cannot be impaired by taking any element of law from the obligation. As the law existed, and long has existed, the holder of a registered certificate of indebtedness, payable at a designated place, cannot be deprived of his rights by a subsequent order of the debtor that it shall be payable elsewhere, or that in the event that it is not presented at the place designated, the interest should cease. The only method in which the debtor can escape liability is by having the money ready for the creditor at the place of payment designated by the contract: *City of Jeffersonville* v. *Patterson*, 26 Ind. 15; 89 Am. Dec. 448; *Glatt* v. *Fortman*, 120 Ind. 384; *Wallace* v. *McConnell*, 13 Pet. 136; *Gelpcke* v. *City of Dubuque*, 1 Wall. 175; *Ward* v. *Smith*, 7 Wall. 447. The authority conferred upon the board of sinking-fund commissioners was to pay the debt, not to change the contract, so that its action in assuming to alter the contract was entirely destitute of force.

As the action of the board of sinking-fund commissioners was ineffective, the question necessarily turns upon the provisions of the act of 1872, which assume to infuse vitality into the action of the board by confirming it. We do not

deem it necessary to inquire whether a void act can be ratified or validated in such a case as this; for if the appropriation was annulled, the question is not important, and if it was not annulled, the question is of still less importance. The pivotal question is, whether the appropriation was annulled; for, as we have seen, if there was no appropriation this action cannot be maintained.

The act of 1872 does not annul the appropriation. In the first section of that act, the general assembly assumes to change the contract made by the state with its creditor, and this that body had no power to do. If there was no power to alter or annul the contract, then the appropriation previously made remains unaffected and in force. We suppose it clear that no law can be changed or repealed by a subsequent act which is void because unconstitutional. If, for illustration, the legislature should incorporate a provision annulling an appropriation for the payment of the state debt in an act regulating the taking up of estrays, no one would doubt that the attempt to annul the appropriation would be utterly futile, and that the appropriation would remain in full force. The principle involved in the imagined case is the same as that involved in the actual case; for the repeal of a statute cannot be accomplished by an unconstitutional act. An act which violates the constitution has no power, and can, of course, neither build up nor tear down. It can neither create new rights nor destroy existing ones. It is an empty legislative declaration, without force or vitality.

The right of the auditor to refuse to audit a claim where an appropriation has been annulled by an effective statute must be conceded, for the principle which requires that conclusion is declared in the case of *Louisiana* v. *Jumel*, 107 U. S. 711. But the question here is, not whether the effective withdrawal of the appropriation will defeat the creditor, but the question is, Was there a valid enactment annulling the prior statutes which made the appropriation? It can make no difference for what cause the statute assuming to abrogate the appropriation is unconstitutional; if in reality it is unconstitutional, the cause of its infirmity is immaterial. Here the infirmity is, that the general assembly, instead of directly annulling or repealing the appropriation, attempted to accomplish that end by annulling the contract of the state; and as that body cannot annul the contract, its action is fruitless. Either this conclusion must be affirmed, or else it must be

affirmed that a state may annul its contract; and this, as we have shown, the constitution forbids.

There is no question in this case as to the power of the state to withdraw a remedy, and thus defeat its creditor. As we have seen, the question here is, whether the appropriation made by prior statutes was destroyed by the act of 1872; if it was not, the remedy is unaffected, for there is no suggestion in any statute looking in the direction of a change of the rule that has so long prevailed in this state, namely, that where there is a valid claim and an effective appropriation, the auditor will be compelled by mandate to draw the proper warrant. In holding, as we do, that this action will lie, we do not adjudge that a state is bound to continue a remedy or an appropriation once provided; we decide simply that where an appropriation is once effectively made, it will stand until annulled by some constitutional statute, and that an enactment assuming to impair a contract of the state is not such a statute.

Courts are bound to ascertain and give effect to the legislative intention when expressed as the constitution sanctions; but neither the courts nor the legislature can disregard the commands of the constitution. No enactment can carry into effect a legislative intention if it be expressed in an unconstitutional mode. The infirmity in the first section of the act of 1872 consists in assuming to do what the legislature has no power to do. It assumes to do what cannot be done without a violation of the constitutional provision forbidding the impairment of the obligation of a contract. It is, as every one knows, the duty of the judiciary to declare all enactments void which clearly infringe the provisions of the paramount law, and in the discharge of that duty we must adjudge that the attempt to annul the contract evidenced by the obligations of the state is utterly futile. As there is no constitutional expression of a legislative intention to abrogate the appropriation made for the payment of the state debt, there is no intention which the courts can carry into effect; hence there is but one thing for us to do, and that is to adjudge that the appropriation remains unannulled.

Freely granting, as we do, that it is the duty of the judiciary to ascertain and give effect to the properly expressed legislative intention, we nevertheless affirm that we have no right to give life and vigor to an act which the constitution makes lifeless and powerless. If it could be granted that the

courts can give life to an unconstitutional statute, then the conclusion stated in the very able argument of the counsel for the appellant would necessarily follow; but this no court can do, so that the conclusion falls to the ground. Without the premise, the conclusion is absolutely foundationless.

It is, in truth, unnecessary to inquire or decide whether the act of 1872 does or does not make an appropriation, for, conceding that it does not, and conceding, also, that it is proper to consider the invalid provisions of that act, still, the result must be the same, for if there was no repeal of the appropriation made by former acts, that appropriation remains in full force and vigor.

The contract of the state, as we construe it, contains a promise to pay interest, and that promise, under the settled rule to which we have referred, binds the state to pay interest upon the principal sum. This disposes of the general question as to the right of the relator to interest under the contract; but the entire question is not disposed of by the principle stated, since the general rule that a state is not liable for interest, unless it contracts to pay it, exerts an important influence upon another phase of the question. To justly apply this general rule that a state is not liable for interest, in the absence of a contract agreeing to pay it, and to ascertain whether our construction of the contract is correct, we must look to the provisions of the statute, to the language of the contract, and to the facts bearing upon the question of interest. Section 5 of the act of 1846 reads as follows: "The interest on the stock hereby created shall be payable half-yearly, at the city of New York, on the first days of January and July of each year, commencing on the first day of July, 1847. But if the interest for any half-year shall not be demanded before the expiration of thirteen months from the time the same became due, it shall only be demandable afterward at the treasury of the state; and for the payment of the interest and the redemption of the principal as herein provided, the faith of the state is hereby solemnly pledged." The certificates show on their face that they were issued under the provisions of this statute, and subsequent statutes, as we have indicated, recognize the obligation to pay interest. The provision we have quoted from the act of 1847 contemplates payment of the interest upon the principal debt after the maturity of the obligations, for it provides for cases where the installments remain unpaid for thirteen months after

maturity. The act of 1846 provides that the certificates shall "be redeemable at the pleasure of the state after twenty years." These provisions clearly express a promise to pay interest on the principal debt after maturity, and that promise is embodied in the certificates. It seems quite clear, therefore, that there is a contract binding the state to pay interest on the principal debt, and until it performs its contract that promise remains valid and enforceable.

The next question which naturally arises is, What rate of interest did the state contract to pay? The law, as we have said, is, that a sovereign is bound to pay only such interest as it binds itself by contract to pay: *United States* v. *North Carolina*, 136 U. S. 211; *United States* v. *Bayard*, 127 U. S. 251; *United States* v. *Sherman*, 98 U. S. 565; *In re Gosman*, 17 Ch. Div. 771. The contract of a sovereign with respect to the payment of interest is governed by a different rule from that which prevails in cases of contracts of citizens, for where there is no promise to pay interest a sovereign is exempt. We are therefore required to determine what rate the sovereign agreed to pay; and when that is determined, the rate recoverable is ascertained and fixed. In this instance the only rate mentioned in the statutes or contract is five per centum, and no other can be recovered, since the only rate recoverable is that fixed by the contract. It is probably true that the opinion in the case of *Gray* v. *State*, 72 Ind. 567, contains some propositions not easily harmonized with the doctrine of the supreme court of the United States; but however this may be, there is an essential difference between that case and the one now at our bar. One essential difference is, that in this case it appears affirmatively that no coupons were issued for the interest, while in the case referred to there were coupons. Another difference is, that it here appears that thirteen months elapsed without the presentation of the certificates on New York, thus giving the state the right to pay at its own treasury, under the provisions of the act of 1847; and this fact exerts an important influence upon the question. Under these circumstances it seems clear that the interest recoverable is that fixed by the statutes and the contract, for the state undoubtedly had a right to declare what interest it would pay. This it did by providing that the certificates should run for twenty years at five per centum per annum interest, and that after twenty years it might, at its pleasure, redeem them. We can conceive no tenable ground

upon which it can be asserted that the rate of interest increased after twenty years, for it seems clear to us that no matter how long the bonds were allowed to run, the rate of interest was that fixed by the statutes and the contract. Our final conclusion upon this branch of the case is, that the relator is entitled to interest on the principal sum at the rate fixed by the statutes and the contract made under them, but to no more.

The remaining question is this: Is the relator entitled to interest upon interest? The contention of his counsel is, that he is not asking compound interest, but that he is asking interest upon each semi-annual installment of interest which the state failed to pay. This question must be examined in the light of the rule that a sovereign state is not liable for interest except in cases where it has promised to pay interest. If there is no such promise, no liability exists. The authorities to which we have referred seem to us to be satisfactory, and to settle the question against the relator; but we have examined others, and find them strongly against him. In the case of *State ex rel.* v. *Board etc.*, 36 Ohio St. 409, it was held that in the absence of a promise to pay interest none can be recovered against a state, and that a state is not within the provisions of a general statute providing for the payment of interest in cases where money is wrongfully withheld from a creditor. The court put its decision upon the familiar rule that a sovereign is not bound by the words of a statute unless it is expressly named, and in support of its conclusion cited these cases: *Trustee etc.* v. *Campbell*, 16 Ohio St. 11; *Joselyn* v. *Stone*, 28 Miss. 753; *State* v. *Kinne*, 41 N. H. 238; *Attorney-General* v. *Cape Fear etc. Co.*, 2 Ired. Eq. 444; *Auditorial Board* v. *Arles*, 15 Tex. 72; *State* v. *Thompson*, 10 Ark. 61. In *Wightman* v. *United States*, 23 Ct. of Cl. 144, the general rule was stated, and it was said: "Hence there is no law fixing a rate of interest for all classes of the public debt, and a long-established public policy has been to pay interest only where it is a subject of express agreement or of positive enactment." It was held in the case of *Tillson* v. *United States*, 100 U. S. 43, that a statute referring a claim did not authorize a recovery of interest, in the absence of words expressly providing for the payment of interest. It is impossible to escape the effect of these authorities, and considerations may be readily suggested which increase their force. One is, that there is no right to coerce the payment of a debt due from a sovereign,

and, of course, a sovereign may impose limitations upon its liability. This it does when it provides for the payment of interest, since it agrees to pay that rate, and no other; and indeed, in the absence of such a provision, no enforceable liability would exist to pay any interest whatever. Again, under constitutions like ours, there is no enforceable liability until an appropriation is lawfully made, and an appropriation cannot be construed as extending to claims which a state is not under an express contract to pay. If this be true, it must also be true that an appropriation to pay the principal and interest of a bond only authorizes the payment of interest upon the principal, and not upon the interest.

We do not inquire whether an individual would or would not be liable for interest upon interest, as it is enough to adjudge that a sovereign state is not liable where, as here, there is no contract to pay interest upon interest.

Judgment affirmed.

APPROPRIATIONS, WHAT ARE. — The constitutions of the different states very generally provide that money shall not be drawn from the treasury except in pursuance of an appropriation made by law: *State* v. *Hickman*, 9 Mont. 370; *People* v. *Spruance*, 8 Col. 535; *Baggett* v. *Dunn*, 69 Cal. 75; *Weston* v. *Dane*, 51 Me. 461; *Martin* v. *Francis*, 13 Kan. 220; *Ristine* v. *State*, 20 Ind. 328–345. Hence has arisen the necessity, in many instances, of determining what is an appropriation, and whether a demand for a warrant upon the treasury of the state has been preceded by an appropriation sufficiently specific to justify the proper officer in issuing the warrant demanded.

The supreme court of Indiana, in considering this question, first viewed it negatively, and determined what was not an appropriation, saying: "What, then, is an appropriation by law? What is a definition of it? Judicial decisions are not cited to any extent on this point. It has rarely arisen in the courts of this state, and yet it is one of great importance in the correct administration of the government, and ought to be definitely settled, and when it is so, carefully observed. There are some things which, plainly enough, are not severally an appropriation. A promise by the government to pay money is not an appropriation. A duty on the part of the legislature to make an appropriation is not such. A promise to make an appropriation is not an appropriation. The pledge of the faith of the state is not an appropriation of money with which to redeem the pledge. Usage of paying money in the absence of an appropriation cannot make an appropriation for future payment. The question is to be settled upon the meaning of the constitution. Usage may be evidence of the meaning the administrative officers have put upon that instrument, and, as such, entitled to respectful consideration; but it is no binding interpretation, and the late usage was in fact probably commenced without much consideration": *Ristine* v. *State*, 20 Ind. 337. The court then proceeded to view the question affirmatively, and said: "An appropriation may be made in different modes. It may be made by an act setting apart and specially appropriating the money derived from a particular source of revenue to a particular purpose. Our swamp-land act is of this

character. 'Appropriation,' as applicable to the general fund in the treasury, may perhaps be defined to be an authority from the legislature, given at the proper time and in legal form, to the proper officers, to apply sums of money out of that which may be in the treasury, in a given year, to specified objects or demands against the state. An appropriation of the money to a specified object would be an authority to the proper officers to pay the money, because the auditor is authorized to draw his warrant upon an appropriation, and the treasurer is authorized to pay such warrant if he has appropriated money in the treasury. And such an appropriation may be prospective; that is, it may be made in one year, of the revenues to accrue in another or future years, the law being so framed as to address itself to such future revenues. So a direction to the officers to pay money out of the treasury upon a given claim or for a given object may, by implication, include in the direction an appropriation": Pages 338, 339.

In the case from which the foregoing quotations were made, it appeared that the state was indebted for a large sum, and that the interest thereon became due semi-annually on the first day of January and July of each year, in the city of New York, and that the faith of the state was solemnly pledged to the payment of such interest; that a statute required the treasurer, at some convenient time prior to the falling due of the interest of the debt of the state, to transmit to New York, without stating to whom the transmission should be made; that the constitution declared all revenues derived from public works, and any surplus remaining in the treasury derived from taxes, after paying the ordinary expenses of government and the interest on the bonds of the state, should be applied annually, under direction of the general assembly, to the payment of the public debt. It was held that there was no appropriation of money for the payment of the interest, and therefore that the auditor was justified in refusing to draw his warrant on the treasurer for the amount of such interest: *Ristine* v. *State*, 20 Ind. 328.

If a statute provides for the appointment of an officer, fixes his salary, and declares that it is payable monthly out of any money in the general fund not otherwise appropriated, this is not an appropriation justifying the drawing of a warrant for the amount of his salary when there is no money in the general fund of the state not appropriated to other purposes: *Baggett* v. *Dunn*, 69 Cal. 75; *Marshall* v. *Dunn*, 69 Cal. 223.

In Colorado, under a constitution declaring that the general appropriation bill shall embrace only the appropriations for the ordinary expenses of the executive, legislative, and judicial departments of the state, interest on the bonded debt, and for public schools, and that all other appropriations shall be made by special bills, each embracing but one subject, the court held that a statute creating a horticultural bureau, and declaring that to enable the bureau to carry out the purposes of the act "the sum of one thousand dollars is hereby appropriated out of any moneys not otherwise appropriated," did not, of itself, make an appropriation such as was required by the constitution: *People* v. *Spruance*, 8 Col. 530.

We apprehend that if the decisions to which we have referred, or any others that may be found, imply that an appropriation must be made in any set form of words, they are not, in that respect, sustained, either by reason or by the majority of the adjudications upon the subject. The appropriations required by the constitutions of the several states are nothing beyond expressions of the legislative will. That will may be expressed in an act which styles itself an appropriation bill, or it may be in some other act. In either event, the words used may amount to an appropriation; the only dif-

ference being that, in a statute which did not purport to make an appropriation, perhaps the intent to make one may need to be expressed in language more clear and definite than if it were contained in a statute professing to be an appropriation bill.

"To an appropriation within the meaning of the statute, nothing more is requisite than the designation of the amount, and the fund out of which it should be paid. It is not essential that funds to meet the same should be at the time in the treasury": *McCauley* v. *Brooks*, 16 Cal. 29. And there are few, if any, instances in which the fund from which payment must be made need be named in the statute. Therefore it was held, in the case last cited, that a valid appropriation had been effected where officers of the state had been, by statute, empowered to lease lands and buildings to be used as a state prison, and the statute had declared that "the sum of fifteen thousand dollars per month, or such sum per month less than that amount, in accordance with the contract to be made, is hereby appropriated out of any money in the treasury not otherwise appropriated, and the controller is hereby authorized and required to draw his warrants on the treasury of the state for that sum." When this case was determined, there was in force in the state a statute prohibiting the drawing of any warrants unless there was an unexpended, specific appropriation to meet them; but the court declared this statute constituted no impediment to the issuing of the warrants by the controller to meet the payment required to be made under the contract entered into under the statute for the leasing of the prison, because "it means only that the treasurer shall not draw a warrant for a specific object when he has already drawn for the full amount of the appropriation made for that object." In an earlier case, in the same state, it appeared that a statute had been enacted creating the office of state printer, and requiring the controller to draw his warrants on the treasury for such amounts as may be due the state printer, and that the controller had refused to draw a warrant, on the ground that the statute did not constitute a specific appropriation; and the claim of the controller was sustained, the court saying: "No fund is appropriated; there is no named amount which is capable of being exceeded. The state-printer acts required warrants to be drawn, but this was in contemplation that there would be a specific appropriation, according to the settled financial system adopted by the legislature, and without which the requirement must be in abeyance": *Redding* v. *Bell*, 4 Cal. 333. This case was reaffirmed at a later day, and was preferred to *McCauley* v. *Brooks*, 16 Cal. 29, so far as any conflict between them exists; and it was said that "by a specific appropriation we understand an act by which a named sum of money has been set aside in the treasury, and devoted to the payment of a particular claim or demand": *Stratton* v. *Green*, 45 Cal. 149. The case last cited was an application for a writ of mandate to compel the controller of state to draw his warrant for the payment of the salary of the petitioner as a member of the board of tide-land commissioners of California. The salary of each member was, by statute, fixed, and was declared to be payable quarterly out of the general fund on the first day of January, April, October, and December. The petitioner had done all the acts required of him to authorize the payment of his salary, but no specific appropriation for such payment had been made, unless made by the provisions of the statute declaring the amount of his salary and the times when it was payable. The claim of the controller was, that this did not constitute a specific appropriation; and in sustaining it the court said: "By a specific appropriation we understand an act by which a named sum

of money has been set apart in the treasury, and devoted to the payment of a particular claim or demand. The act of 1869–70 (p. 541), in its sixth section, provides that upon the production of the certified approval of the state board the controller shall draw his warrant upon the general fund for the payment of the amount; but it can scarcely be claimed that the entire 'general fund' named is specifically appropriated by the act for the payment of this particular claim. If it has been so appropriated for that purpose, the authority to draw the warrant would continue until the general fund had been exhausted, and then ceasing for a time, would revive again so soon as other moneys should be received thereafter into that fund. The fund upon which a warrant must be drawn must be one the amount of which is designated by law, and therefore capable of definite exhaustion, — a fund in which an ascertained sum of money was originally placed, and a portion of that sum being drawn, an exhausted balance remains, which balance cannot be thereafter increased, except by further legislative appropriation. We think that the provisions of the section of the code referred to were intended to prescribe a uniform rule of official conduct for the controller in this respect, and as it is the latest expression of the legislative will, it necessarily displaces, and by implication repeals, the provision of section 6 of the act of 1869–70 in respect to his duty to draw the warrant of the petitioner. Our attention has been drawn to the case of *McCauley* v. *Brooks*, 16 Cal. 11, but we prefer the rule announced here in the earlier case of *Redding* v. *Bell*, 4 Cal. 333, in which the act of April, 1854 (in almost the identical words of the code), received the same construction as that we place upon those words as found in the code."

The most recent decisions in California are, however, in harmony with *McCauley* v. *Brooks*, 16 Cal. 29, rather than with the case last cited. *Proll* v. *Dunn*, 80 Cal. 220, was an application to compel the state controller to draw his warrant in favor of petitioner for supplies furnished the state mining bureau. The statute upon which the petitioner relied, so far as material to the subject here under consideration, was as follows: "The sum of one hundred thousand dollars is hereby appropriated for the support and maintenance of the mining bureau, created under an act entitled 'An act to provide for the establishment and maintenance of a mining bureau,' approved April 16, 1880, and the act supplementary thereto, approved March 21, 1885, and at least seventy per cent of this appropriation shall be used for geological work in the field." The contention of the parties, and the views of the court, as well as its review of the prior decisions in the same state, sufficiently appear from the following extracts from the opinion of the court: —

"There is no provision in the constitution providing or prescribing any particular form of words in which an appropriation shall be made, except that it shall be made by law. It is claimed that the act does not specify upon what fund the warrant is to be drawn; and as the controller is required in every warrant to specify the fund out of which it is payable, therefore, that it is insufficient. Several authorities are cited which are claimed to support the proposition that the act itself must specify the fund out of which the money is to be drawn, but we do not think they bear that construction, in the sense in which it is claimed for it here, and as to the statutes, not one appropriation act in fifty designates the fund out of which the money is to be drawn. The majority of all appropriations are drawn out of a single fund, and that without any designation in the act as to what fund the money shall be drawn from.

"In *Fowler* v. *Pierce*, 2 Cal. 167, cited by counsel, the question under con-

sideration in that part of the opinion from which the quotation was made was, whether or not mandate was the proper remedy. The words quoted by counsel were not necessary to the determination of that question, and although the language quoted seems to assume that the fund out of which the money was payable had been specified in the act referred to, a reference to the act itself shows that such was not the fact in any sense other or different from that found in the act under consideration here. The case, as a whole, is against rather than in favor of the position taken by respondent. In *McCauley* v. *Brooks*, 16 Cal. 11, also cited by respondent, there was nothing in the act designating the fund out of which the money was to be drawn. The language of the act there was: 'Appropriated out of any money in the treasury not otherwise appropriated.' These words constitute no designation of 'the fund,' in the sense in which that term is applied in this objection. By reference to the act referred to in *Stratton* v. *Green*, 45 Cal. 149, — the act creating a board of tide-land commissioners (Stats. 1869–70, p. 541), — it will be seen that it provided for the incurring of large expenses and salaries, and that the controller should draw his warrant upon the general fund for the payment of the same; but neither in that act nor in any other did the legislature make any appropriation out of the general fund, or any other fund, for the payment of those expenses or salaries. No attempt was made to appropriate money for that purpose, and the mandate was in that case refused for want of appropriation. *Baggett* v. *Dunn*, 69 Cal. 75, was a case where the claim was for a salary, — a claim which was not required to be presented to the board of examiners. The controller refused to draw his warrant, because no appropriation had been made for the payment of the salary for that year, and the court sustained him. In *Marshall* v. *Dunn*, 69 Cal. 223, the warrant was refused because the appropriation was exhausted, and the court sustained the ruling.

"Neither the constitution nor the code requires that an appropriation act shall specify the fund out of which the appropriation shall be paid, nor is it usual in appropriation acts to do so. If such a specification is required, the wheels of the government ought long since to have stopped, for out of many acts which we have examined, including the general appropriation bills for the current and past years, we find none which make such designation. It has become and is the custom in this state, of very general, but not universal, application, to use the phrase 'appropriated out of any money in the treasury not otherwise appropriated.' But it seems to be mere custom, not founded upon any constitutional or other legislative requirement. And we learn from the argument that the controller interprets that phrase to mean 'out of the general fund.' We know of no law which authorizes such an interpretation. On the contrary, it would seem that everything authorized by law to be paid out of the state treasury is payable out of the general fund, if not specially made payable out of some specific fund, as the 'school fund,' the 'interest and sinking fund,' and the like. The truth is, there are not many separate funds in the treasury, but there are many appropriations, and most of the latter are payable out of the same fund, — the general fund. The treasurer keeps an account of the separate funds, while the controller keeps account of the separate appropriations, as well as of the separate funds. 'Appropriation' and 'fund' are not synonymous terms. All through the statutes there is a distinction made between them. In the section of the Political Code (3713) which provides for the amount of revenue to be raised (and which is amended at each session of the legislature), a given amount is provided for each separate fund, but nothing is said about appropriations.

The amount named for the general fund is supposed to be sufficient to meet the aggregate of all the appropriations made for the year, except such as have been expressly made payable out of some special fund. But if the word 'fund,' as used in subdivision 17, section 433, of the Political Code is synonymous with the word 'appropriation,' it only remains to determine whether there has been an appropriation in this case.

"Appropriations are made, and can only be made, by the legislature. The constitution has prescribed no set form of words in which it is to be done. All that is required is a clear expression of the legislative will on the subject. It has declared that the sum of one hundred thousand dollars is hereby appropriated, — not more than one half of which shall be expended in the forty-first fiscal year. That appropriation is made for the maintenance of a bureau theretofore established by act of the legislature, and for several years past supported in whole or in part by legislative appropriation: See Stats. 1883, p. 279; 1885, p. 86; 1887, p. 62. But, says the controller, it has not designated the fund out of which the appropriation is payable. It did not in any of the former years; nor has it designated the fund out of which the salaries of any of the officers of the state, or the expenses of any of the other bureaus or departments of the government, shall be paid. 'It has not said that the money is appropriated out of any moneys in the treasury not otherwise appropriated.' What of it? The legislature can make no appropriation except 'out of the treasury.' The remaining words are not only a form not required by law, but usually a fiction, for at the time of the passage of appropriation bills there is not usually any money in the treasury in excess of existing appropriations, and whenever the legislature makes a new appropriation, it is to be assumed that it will provide funds to meet the same. As said by Chief Justice Field in *McCauley* v. *Brooks*, 16 Cal. 11: 'Appropriations are made in anticipation of the receipt of the yearly revenues.' 'An appropriation is the act of setting apart, or assigning to a particular use or person, in exclusion of all others; application to a special use or purpose, as of money to carry out some public object': Webster's Dict. 'An appropriation of the money to a specific object would be an authority to the proper officers to pay the money, because the auditor is authorized to draw his warrant upon an appropriation, and the treasurer is authorized to pay such warrant if he has appropriated money in the treasury': *Ristine* v. *State*, 20 Ind. 339.

"In this act we have a clear, distinct expression of the legislative will making the appropriation. The words 'out of any moneys in the treasury not otherwise appropriated' are not necessary to the expression of that will, or the making of such appropriation. They are in common use in this state, but nowhere made necessary, and are not always used: See act to provide for improvements of the Deaf, Dumb, and Blind Asylum, Stats. 1889, p. 303; act to provide for a system of irrigation, etc., Stats. 1877–78, p. 634, subd. 1 of sec. 4; act making appropriations for benevolent purposes, Stats. 1875–76, p. 323. No doubt further examination would disclose many similar omissions. So far as we have observed, they are never used in the acts of Congress. Whether they are in common use in other states, and if so, whether there is a reason for it, we have not time to inquire, nor do we deem it necessary, in the absence of any requirement for their use in this state.

"If the word 'fund,' in the point here made by the controller, and in subdivision 17, section 433, Political Code, is used in its technical sense, as designating the separate funds in the treasury, then the whole history and practice under it in this state from its earliest organization is against the

contention now made, that the appropriation act itself must specify the fund upon which the warrant is to be drawn; but if it is used as an alternative for 'appropriation,' then all difficulty is removed, provided there is a specific appropriation against which the warrant may be drawn, and the case does not differ from all others where the appropriation is not by express words made payable out of some one of the separate funds in the treasury other than the general fund.

"The board of examiners have, by their action under sections 660 and 661 of the Political Code, by implication at least, held that in this case there was a specific appropriation for the maintenance of the mining bureau, and that this claim was payable out of that appropriation. In this we think the board was correct, and unless the appropriation has been exhausted (of which there is no claim), the controller has no discretion, but is required by law to draw his warrant therefor upon such appropriation.

"Let the writ issue as prayed."

In *Humbert* v. *Dunn*, 84 Cal. 57, the statute involved created a commission to examine rivers and harbors, and provided that each of its members should receive an annual salary of two thousand four hundred dollars, payable monthly "and his traveling expenses while engaged in the performance of official duties, said salary and expenses to be paid out of any money in the state treasury not otherwise appropriated." In determining that this statute constituted a specific appropriation and required the controller to issue his warrant for the monthly salary of a commissioner, the supreme court said: —

"The question is, whether these provisions of the act constitute an 'appropriation' within the meaning of that term as used in section 22, article 4, of the constitution, which provides that 'no money shall be drawn from the treasury but in consequence of appropriations made by law.' It is true, the usual formula, 'there is hereby appropriated the sum of dollars out of any money in the state treasury not otherwise appropriated, for the payment of salaries,' etc., is not found in the act, but the intention of the legislature to provide for the payment of the salaries of the commissioners as they accrued is clearly manifested in the language used: 'Each member shall receive a salary of two thousand four hundred dollars per annum, payable monthly,' and it is 'to be paid out of any money in the state treasury not otherwise appropriated.' There is nothing in this language indicating an intention to postpone the payment of the salaries of the commissioners until the next session of the legislature. They are to be paid monthly, and out of any money not otherwise appropriated. 'Not otherwise appropriated' when? Clearly at the time when the services are performed and the monthly payments become due. While it is customary to use the words 'there is hereby appropriated the sum,' etc., in bills appropriating money for the payment of salary and other expenses of the government, it is not essential to the validity of an appropriation that those words, or any of them, should be used, if the legislature has clearly designated the amount and the fund out of which it is to be paid. Has the legislature fixed the amount of the claim and designated its payment out of a certain fund? These are the only things necessary to the validity of the appropriation, there being no other constitutional objection to the bill than as to the sufficiency of the act of appropriation: *McCauley* v. *Brooks*, 16 Cal. 28.

"The limitation that 'no money shall be drawn from the treasury but in consequence of appropriations made by law' is taken literally from the constitution of the United States. Its object is to secure to the legislative department of the government the exclusive power of deciding how, when, and

for what purposes the public funds shall be applied in carrying on the government: 2 Opinions Attorneys-General, 670. It had its origin in Parliament in the seventeenth century, when the people of Great Britain, to provide against the abuse by the king and his officers of the discretionary money power with which they were vested, demanded that the public funds should not be drawn from the treasury except in accordance with express appropriations therefor made by Parliament: Hallam's Constitutional History, 555; and the system worked so well in correcting the abuses complained of, our forefathers adopted it, and the restraint imposed by it has become a part of the fundamental law of nearly every state in the Union. To the legislative department of the government is intrusted the power to say to what purpose the public funds shall be devoted in each fiscal year, and, as stated before, when the legislature has clearly indicated its will as to the claim which is to be paid and the fund from which it is to be paid, the constitutional requirement is satisfied, and no particular form of words is essential to make the appropriation valid: *Proll* v. *Dunn*, 80 Cal. 220. In *Ristine* v. *State*, 20 Ind. 339, the court said: 'An appropriation of the money to a specific object would be an authority to the proper officer to pay the money, because the auditor is authorized to draw his warrant upon an appropriation, and the treasurer is authorized to pay such warrant, if he has appropriated money in the treasury. And such an appropriation may be prospective; that is, it may be made in one year of the revenues to accrue in another or future years, the law being so framed as to address itself to such future revenues.'

"It is claimed that the act is unconstitutional because it does not specify the amount to be appropriated; that the amount which may be incurred as expenses is uncertain. So far as the traveling expenses are concerned, this contention may be good, although it has been held that 'it is not essential or vital to an appropriation that it should be of an amount certainly ascertained prior to the appropriation': *People* v. *Miner*, 46 Ill. 390. We are not called upon to decide this question, however, as the only claim here is for salary, which is fixed by the act at two thousand four hundred dollars per annum, payable monthly. The act provides for the appointment of three engineers as commissioners, and so far as their salaries are concerned, the amount appropriated is fixed and certain.

"The demurrer is overruled, with permission to file an answer, if the attorney-general should be so advised, within ten days after notice of this decision."

The decisions in Indiana affirm the same general principles as those in California. Thus in one it was said: "It is true, as claimed, that no money can be lawfully drawn from the treasury except in pursuance of an appropriation made by law; but such an appropriation may be made impliedly as well as expressly, and in general as well as in special terms. It may also be a continuing appropriation as well as one for a temporary purpose or a limited period. The use of technical words in a statute making an appropriation is not necessary. There may be an appropriation of public moneys to a given purpose without in any manner designating the act as an appropriation": *Campbell* v. *Board of Commissioners*, 115 Ind. 594.

If the salary of a public officer is fixed by statute, and the times when it shall be paid designated, this is equivalent to an appropriation of moneys to make payment at such times, and no annual or special appropriation is necessary to authorize the proper officer to draw his warrant on the treasury for the amount due: *Reynolds* v. *Taylor*, 43 Ala. 420; *State* v. *Borden*, 6 La. Ann. 68; *Nichols* v. *The Comptroller*, 4 Stew. & P. 154; *State* v. *Kenney*,

10 Mont. 485; *Humbert* v. *Dunn*, 84 Cal. 57, and the principal case. *Contra*, *State* v. *Weston*, 6 Neb. 16.

The constitution of a state is a law, and its provisions may therefore operate as an appropriation of moneys without any legislative action whatever. Thus if it states what the salary of an officer shall be, and the times when it shall become due, it is the duty of the controller to draw and the treasurer to pay warrants for the amount of such salary as it falls due: *State* v. *Hickman*, 9 Mont. 370; *Thomas* v. *Owens*, 4 Md. 189; *State* v. *Weston*, 4 Neb. 216. To hold otherwise would give the legislature, by its non-action, the power to annul the constitution.

A statute, though sufficient to constitute an appropriation, may be rendered ineffectual by the fact that all the moneys in the treasury are, either directly or by implication, appropriated to other purposes. Thus statutes may contain appropriations for specific sums for special purposes, and other general appropriations by which sums are directed to be paid out of moneys not otherwise appropriated, in which case, if there are no more moneys than are necessary to pay the specific appropriations, they will generally be conceded precedence, and the less specific appropriations will properly remain unpaid, though the statutes respecting them are sufficient to constitute appropriations if the requisite moneys were in the treasury to meet them. So appropriations required to meet the current or necessary expenses of the state or county government are, we think, to be preferred to other appropriations. No court would willingly hold that the wheels of government may be stopped, by taking the money raised for the express purpose of paying the necessary current expenses of the government, and applying it to the payment of old debts which had perhaps been entirely overlooked by the legislature, or the payment of which might be impossible or inexpedient in view of the financial condition of the state. This precise question was decided by the judges of the supreme court of Colorado, in their opinion given in accordance with the constitution of that state, in response to interrogatories propounded by the governor: *In re Appropriations*, 13 Col. 316. One of the questions so propounded involved the determination of the question whether, in case the money in the state treasury should be insufficient to pay all valid appropriations drawn against it, such appropriations should be paid in the order they were made, or whether precedence should be given to any particular class. In answer to this question, the judges certified as their opinion that the acts of the legislature making the necessary appropriations to defray the expenses of the government for a particular fiscal year, including interest, on any valid public debt, are entitled to preference over any other appropriations from the general public revenue of the state, without reference to the date of their passage. After referring to the clause in the constitution of the state prohibiting the payment of money unless in pursuance of an appropriation made by law, and the clause permitting the governor to veto any distinct item in an appropriation bill, the judges said: "This shows a clear purpose to invest the executive with discretion to save such appropriations as are necessary to defray the expenses of the government without the danger of encumbering or defeating them by excessive or improvident expenditures. Considering the great care thus taken to secure and guard such appropriations, we cannot doubt that the ordinary expenses of the legislative, executive, and judicial departments of the state are the expenses primarily intended to be provided for by section 2, article 10. It would be a deplorable condition of affairs if, by making excessive appropriations, or by authorizing improvident expenditures under enactments

containing emergency clauses, the constitutional limit should be reached before the passage of appropriations indispensable for the support and maintenance of the several departments of the government, whereby the latter appropriations should be rendered unconstitutional. We must not be understood as expressing any fear that the general assembly would intentionally attempt any such thing, though it might happen through inadvertence if a different construction were given to the constitutional provisions under consideration. In view of the examination we have given the subject, we are of the opinion that acts of the general assembly making the necessary appropriations to defray the expenses of the executive, legislative, and judicial departments of the state government for each fiscal year, including interest on any valid public debt, are entitled to preference over all other appropriations from the general public revenue of the state, without reference to the date of their passage, and irrespective of emergency clauses." A similar result was reached in the case of *McDonald* v. *Grinwold*, 4 Cal. 352, in which the court, construing the act authorizing the board of supervisors of a certain county to levy a tax of a given amount "for county purposes," held that the tax so raised must be employed, at least in the first instance, for the payment of the ordinary expenses of the county, in preference to the payment of the floating debt."

So it has been held in Louisiana that where there are officers whose salaries are fixed by the constitution, and also state institutions recognized by the constitution, and which it intends shall be continued and kept in an efficient condition, appropriations made for such salary and the maintenance of state institutions must be given precedence over other appropriations: *State* v. *Burke*, 37 La. Ann. 434; *State* v. *Burke*, 35 La. Ann. 457.

Some of the constitutions, in addition to the general declaration that no money shall be drawn from the treasury except in pursuance of appropriations made by law, further declare that no appropriation can be made for a longer period than two years. In considering this latter provision, it has been said: "This section means simply this: that provisions for the support of the government by one legislature must be limited to two years. It does not require that the amount appropriated be actually drawn from the treasury during that time, but the expenses must be incurred on the salary earned during the two years for which the appropriation was made": Opinion of the Judges, 5 Neb. 572.

The question whether, when an act has been passed authorizing a contract to be entered into on behalf of the state, and making the appropriations necessary on its part to comply with its contract, the act can be repealed, and the appropriations thereby withdrawn, was also presented in the case of *People* v. *Brooks*, 16 Cal. 11, and in the opinion therein by Mr. Justice Field, now of the supreme court of the United States, was disposed of as follows: "The act of April 19, 1859, providing for the condemnation and appropriation to the use of the state of the interest of certain parties in the state prison grounds, repealed the act of March 21, 1856, but such repeal did not affect the contract made under the repealed act. The contract was a thing consummated, and, after its execution, did not depend for its further existence upon the continuation of the act which originally gave it life. The contract remained, after the extinction by repeal of its parent act, possessed of the same operative and binding force as previously. The rights of the parties and their respective obligations became fixed by that instrument beyond the reach of legislative power. They required for their enforcement no further legislation or reference to the act under which they were created, and

were vested interests. The premises constituting the prison and prison grounds had been leased for five years, and the leasehold interest was beyond the power of revocation. It was vested for that period, and the right to the ten thousand dollars a month was equally so. Upon neither the right to the interest in the property or to the money could subsequent legislation operate. The constitution tolerates no such absurdity as the total destruction of a contract, whilst it inhibits attempts to impair its efficacy. If the proposition that a repeal of the act of March 21, 1856, discharged the appropriation and rendered the contract no longer obligatory could be sustained, it is not perceived why repudiation of bonds issued under the various funding acts of the state may not, on the same grounds, be defended. The indebtedness of several cities and counties of the state has been funded, and bonds have been issued therefor under different statutes, which provided at the same time the means for meeting the yearly interest thereon, and for their ultimate payment. It would be a strange doctrine that a repeal of any such funding acts would impair the right of the bond-holders, either to their interest or principal. The learned attorney-general would never advance a doctrine so repugnant to all just notions of the obligations of good faith and the guaranties furnished by the constitution. And if the state were indebted within the constitutional limit, excluding the amount rendered valid by the vote of the people, and should see fit in like manner to fund the indebtedness, he would not contend, we are confident, that subsequent legislation could impair, much less destroy, the rights of the parties taking her bonds. And yet her faith would be no more pledged for their payment than it is to discharge the obligations of the contract in relation to the state prison. The contract with the bond-holders and the contract with the lessee would stand upon the same footing. The repudiation of one would not be more odious than would be the repudiation of the other. If she can do one, she can do the other. If she can repudiate one, she can repudiate both. The truth is, she can do neither. The appropriation once made, the funds to meet it having been provided and received into the treasury, the legislature cannot, by revoking the appropriation, prohibit the treasurer from making the payments designated."

INTEREST. — WITH RESPECT TO THE OBLIGATION OF THE STATE to pay interest upon its indebtedness, the principal case is well sustained by other authorities upon the same subject. In nearly and perhaps in all of the states there are statutory provisions providing that moneys, after they become due, shall, in the absence of express contract to the contrary, bear the rate of interest specified in such statutes; but, acting under the old common-law rule that the king or sovereign is not bound by a statute unless expressly named therein, it has been uniformly held that these statutory provisions respecting interest did not apply to any obligation either of the state or of the national government, and therefore that interest is never allowed upon such obligations, in the absence of some special statute clearly manifesting the intention of the sovereign to be bound for the payment of interest upon the particular obligation or class of obligations under consideration: *United States* v. *North Carolina*, 136 U. S. 211; *State* v. *Thompson*, 10 Ark. 61; *State* v. *Board of Public Works*, 36 Ohio St. 409; *State* v. *Bank of Washington*, 18 Ark. 554; *United States* v. *Sherman*, 98 U. S. 565; *United States* v. *Bayard*, 127 U. S. 251; *Tillson* v. *United States*, 100 U. S. 43; *In re Goeman*, 17 Ch. Div. 771; *Attorney-General* v. *Cape Fear N. Co.*, 2 Ired. Eq. 444; *Bledsoe* v. *State*, 64 N. C. 392; *Trustee* v. *Campbell*, 16 Ohio St. 11; *Josselyn* v. *Stone*, 28 Miss. 753; *Wightman* v. *United States*, 23 Ct. of Cl. 144.

STATES, CONTRACTS OF. — A state may make a valid contract in like manner as a private person may do so: *State* v. *Bank*, 2 Houst. 99; 73 Am. Dec. 699. A state, entering into a contract with its citizens, can claim no exemption from the rules of law applicable to contracts between individuals: *Patton* v. *Gilmer*, 42 Ala. 548; 94 Am. Dec. 665. When a state breaks its contract, it may be liable for prospective profits: *Danolds* v. *State*, 89 N. Y. 36; 42 Am. Rep. 277. However, a state cannot be sued, as in the case of a private person, except by its own consent: *Carter* v. *State*, 42 La. Ann. 927; 21 Am. St. Rep. 404, and note; *Julian* v. *State*, 122 Ind. 68.

STATUTES — UNCONSTITUTIONALITY, EFFECT OF. — An unconstitutional statute is absolutely null and void: *State* v. *Tufly*, 20 Nev. 427; 19 Am. St. Rep. 374, and note; *Adsit* v. *Osmun*, 84 Mich. 420. The repealing clause in an unconstitutional act falls with the rest of the act: *State* v. *Blend*, 121 Ind. 514; 16 Am. St. Rep. 411. A statute cannot be repealed by an act which is unconstitutional: *Judson* v. *City of Bessemer*, 87 Ala. 240.

BRUMBAUGH *v.* RICHCREEK.

[127 INDIANA, 240.]

FRAUDULENT CONVEYANCE. — A CREDITOR CANNOT MAINTAIN AN ACTION TO SET ASIDE A CONVEYANCE of his debtor as fraudulent, unless he shows that his debtor has not, at the time the action is brought, any property out of which the payment of the debt can be compelled, though when made, such conveyance left the debtor without any property subject to execution.

FRAUDULENT CONVEYANCE. — Though a debtor conveys property with the intention of defrauding his creditor, the latter cannot complain, if the former retains or subsequently acquires property out of which the debt may be collected.

CREDITOR OF PERSON OF UNSOUND MIND, whose mental unsoundness has not been judicially declared, cannot maintain a suit in equity to set aside a conveyance made by the debtor which does not injure the creditor.

PRACTICE. — THE FINDING OF FACTS NOT ALLEGED cannot sustain a judgment upon appeal.

I. H. Hall, E. Haymond, and L. W. Royse, for the appellant.

S. J. North and H. S. Briggs, for the appellees.

McBRIDE, J. This was a suit by Rachel Richcreek, the appellee, to set aside an alleged fraudulent conveyance of land.

The appellee was a judgment creditor of Susan Brumbaugh, who had conveyed certain lands to appellant, and appellee insisted that the conveyances were made by said Susan and received by appellant for the sole purpose of preventing the collection of her claim.

The complaint is in two paragraphs, and the circuit court overruled a separate demurrer to each paragraph. Appellant excepted, and this ruling is assigned as error.

In the first paragraph of the complaint it is alleged, in substance, that on the twenty-fourth day of October, 1885, said Susan, "contriving to cheat, hinder, delay, and defraud plaintiff out of her said debt," conveyed a portion of said land to appellant, and afterwards, on the first day of April, 1887, "the more effectually to place said Susan in a situation to defeat the collection of plaintiff's claim, and to cheat and defraud plaintiff out of her said claim," conveyed to appellant the residue of said land, and that such conveyances were voluntary, and without consideration; that appellant had knowledge of said indebtedness, and of said fraudulent purpose, and that said conveyances left said Susan "with no property whatever subject to execution."

In the second paragraph it is alleged that said Susan was "of weak and infirm mind, and wholly incapable of making any contracts or transacting any business for herself," and that appellant, "having knowledge of her indebtedness to plaintiff, and also having full knowledge of her mental incapacity, and purposing and intending to cheat and defraud plaintiff out of her debt, and to prevent it being made out of the property of said Susan," procured and induced her to convey the land to him, which she did at the time indicated in the first paragraph, without any consideration whatever, "leaving said Susan without any property whatever subject to execution."

There is no averment in either paragraph of the complaint that at the time of the commencement of the suit the debtor had no property out of which the debt might have been collected, nor is there any equivalent averment.

This suit was commenced October 10, 1887, while, as above shown, the last deed was made April 1, 1887; and the only averment occurring in either paragraph with reference to what, if any, property she had remaining is that quoted above, that when the deed of April 1, 1887, was made, it left her "without any property subject to execution."

In a suit by a creditor to set aside a conveyance of property on the ground that it was made to defraud creditors, an averment that at the time the suit was brought the debtor had no property out of which the debt might be collected, or an averment equivalent thereto, is material and necessary, and its omission is fatal: *Bruker* v. *Kelsey*, 72 Ind. 51; *Sherman* v. *Hogland*, 73 Ind. 472; *McCole* v. *Loehr*, 79 Ind. 430; *Bishop* v.

State ex rel., 83 Ind. 67; *Taylor* v. *Johnson*, 113 Ind. 164; *Adams* v. *State*, 87 Ind. 573.

A creditor is not authorized to interfere with any disposition which his debtor may make of his property, so long as he is not injured thereby. The debtor may convey his property with the intention of defrauding his creditor, but if he still retains property subject to execution out of which the debt may be collected, the debtor cannot complain. So, also, if the debtor conveys all of his property with like fraudulent purpose, retaining nothing, but when the creditor seeks to collect the debt of him he has acquired and then has property subject to execution from which the claim can be made, the creditor has no ground for interfering with the fraudulent conveyance.

The averments in the second paragraph that the debtor was of unsound mind when she made the conveyances do not affect the question. The contracts of a person of unsound mind, not under guardianship, or whose mental unsoundness has not been judicially determined, are voidable, but are not void. A creditor, however, cannot avoid a conveyance made by his debtor solely because the debtor was of unsound mind when he made it. Nor does the fact that the grantee, knowing of the debt and of the debtor's mental weakness, took advantage of such weakness for the purpose and with the intention of thereby defrauding the creditor, authorize the creditor to appeal to a court of equity to set aside such deed, unless he is injured thereby.

Both paragraphs of the complaint are fatally defective, and the demurrer should have been sustained to each paragraph.

It is due to the court below to say that while the question here involved is fairly in the record by demurrer and exception, it was probably never in fact presented or argued. This seems to be clearly indicated by the special findings, which show that evidence was heard, and the court found the existence of the facts which ought to have been averred and were not. This, however, does not cure the error, as the appellants may say, We only called witnesses to meet the facts charged, and could not anticipate that the court would hear evidence on facts not put in issue. The court cannot say, if the fact had been put in issue, that appellants might not have met it successfully with proof.

Judgment reversed, with direction to the circuit court to proceed in accordance with this opinion.

FRAUDULENT CONVEYANCES. — A voluntary conveyance will not be set aside as fraudulent on the allegation that the grantor was indebted before and after its execution; a creditor cannot avoid a conveyance made by his debtor, if it left him with ample means to satisfy the creditor's demands: *Miles* v. *Richardson*, Walk. (Miss.) 477; 12 Am. Dec. 584; *Wilbur* v. *Nichols*, 61 Vt. 432; *Brock* v. *Rich*, 76 Mich. 644. Allegations showing that a debtor has conveyed away all of his property, leaving nothing to satisfy the demands of creditors, is a sufficient statement of the facts constituting the fraud: *Marston* v. *Dresden*, 76 Wis. 418; *Gove* v. *Campbell*, 62 N. H. 401; *Smalley* v. *Mase*, 72 Iowa, 171.

EARNHART *v.* EARNHART.

[127 INDIANA, 397.]

RULE IN SHELLEY'S CASE DOES NOT APPLY WHERE it unequivocally appears that the persons who are to take are not to take as heirs of the grantee or devisee.

SHELLEY'S CASE. — A devise of property to E. for and during the term of his natural life, and at his death to the persons who would have inherited the same if E. had owned the same in fee-simple at the time of his death, but declaring that there shall vest in E. a life estate, and nothing more, does not vest the fee in E., but gives him a life estate only.

L. W. Welker, for the appellant.

H. G. Zimmerman and F. M. Prickett, for the appellees.

OLDS, C. J. John Earnhart died testate. By item 3 of his last will and testament he gave to his granddaughter, Harriet Cook, the only child of his deceased daughter, Susannah, five hundred dollars, to be paid within one year after his death, or within one year after the death of his wife, if she survived him. It is specifically stated in said item that said legacy shall be paid by devisees in said will, other than his wife, to wit: "Nelson James, Lewis Thomas, and William Earnhart, Jane Wolf and Ellen Wolf, in equal shares, the shares of each to be a charge upon the lands hereby devised to him or her respectively."

Item 10 of the will is as follows: "I give and devise to my son, William Earnhart, for and during the term of his natural life, subject to the life estate of my said wife therein, the following described real estate in Noble County, Indiana, to wit: The north half of the northwest quarter and the west half of the northwest quarter of the northeast quarter of section thirty-four (34), in township thirty-four (34) north, range nine (9) east. At the death of said William Earnhart, I give and devise said lands in fee-simple to the persons who would have

inherited the same from the said William Earnhart had he owned the same in fee-simple at the time of his death, the same to go to said persons in the same manner and in the same proportions as though said William Earnhart had owned the same in fee-simple at the time of his death. But the provisions of this item should only vest in the said William a life estate in said lands, and nothing more."

The appellant brings this action, setting out a copy of the will, and alleging that he owns the fee-simple title to the land described in item 10 of the will, and asking that the will be so construed as to give to him the fee-simple title to said land, and that his title be quieted to the same, making the other devisees and the executor parties defendant, alleging that they claim some interest in said land adverse to the appellant.

The appellees demurred to the complaint for want of facts, which demurrer was sustained, exceptions reserved, and this appeal is prosecuted, assigning such ruling as error.

It is contended that item 10 in the will is governed by the rule in Shelley's case, and that it gives to William Earnhart a fee-simple title to the land.

It is settled that the rule in Shelley's case is recognized as law and a rule of property in this state; but we do not think it applicable to the item of the will under consideration. The rule does not apply where it unequivocally appears that the persons who are to take are not to take as heirs of the grantees or devisees. In this case it is clearly and distinctly expressed, so that it unequivocally appears from the language that it was the intent of the testator that the appellant should take only a life estate in the land. It then makes a further devise of the remainder of the estate in the land to other persons, describing them, not by name, but in a definite manner, as the persons who would inherit the same if the fee was in the appellant, and distributes it between such persons in the same proportions as they would inherit from said appellant. The words used in making disposition of the remainder are words of purchase, descriptive of the persons to whom the fee is devised.

If in one item of the will the testator had devised to his son, William Earnhart, a life estate in the particular tract of land, and in another item had made disposition of the remaining fee after his death to the wife and children of the said William, naming them, there could be no possible question but that William would take a life estate, and his wife and children

would take the fee; nor do we think there can be any difference if, instead of naming them, the will described them as the wife and children, stating that they should take one third to the wife, and the two thirds to go to the children in equal shares. If it described them as the heirs who would inherit from William in the same proportion as the law would cast it upon them, certainly there can be no difference whether the testator make such disposition of his property in one or in separate items, so it be clearly expressed. In item 10 of the will under consideration, the intention of the testator is clearly expressed to be that William take only a life estate, and a separate and distinct devise of the remaining fee at his death to the heirs of William, in the same proportion they would have inherited had William owned the same in fee. It is clearly expressed that such heirs shall not take by descent from William, but by purchase from the testator. This being clearly expressed by the will, the rule in Shelley's case does not apply: See *Fountain County etc. Co.* v. *Beckleheimer*, 102 Ind. 76; 52 Am. Rep. 645. When it clearly appears that the testator did not intend to grant a fee, then the devise will not be so construed as to vest one: *Allen* v. *Craft*, 109 Ind. 476; 58 Am. Rep. 425.

The will provides that the appellant shall pay his portion of the legacy given to the granddaughter, Harriet Cook, and makes it a charge against the land.

There was no error in sustaining the demurrer to the complaint.

Judgment affirmed, with costs.

RULE IN SHELLEY'S CASE. — That the rule in Shelley's case may apply, the limitation over must be to the heirs in fee or in tail as a *nomen collectivum* for the whole line of inheritable blood: *Kuntzleman's Estate*, 136 Pa. St. 142; 20 Am. St. Rep. 909. Compare extended note to *Carpenter* v. *Van Olinder*, 11 Am. St. Rep. 100–107, for a discussion of the application of the rule in Shelley's case. In Illinois, when a devise is to the heirs generally, the rule applies, and will control in determining the estate devised: *Hageman* v. *Hageman*, 129 Ill. 164. The rule will not apply to a devise in which the word "heirs" is used as a synonym for "children": *Conger* v. *Lowe*, 124 Ind. 368. For the application of the rule in Massachusetts, see *Trumbull* v. *Trumbull*, 149 Mass. 200.

STATE v. ENGLE.

[127 INDIANA, 457.]

MANDAMUS WILL LIE AGAINST A JUSTICE OF THE PEACE TO COMPEL HIM TO ENTER JUDGMENT, to make correct docket entries in accordance with the facts, and to perform all duties which are ministerial.

COSTS. — THE MERE TAXATION OF COSTS IS A MINISTERIAL ACT, where there is no question of the amount to be taxed.

MANDAMUS. — If a justice of the peace enters a judgment of dismissal, he may, by *mandamus*, be compelled to enter judgment in favor of defendant for his costs, and to issue execution thereon.

J. C. Chaney and W. S. Maple, for the appellant.

A. B. Williams, J. T. Beasley, G. W. Buff, and J. S. Bays, for the appellee.

OLDS, C. J. This is a proceeding brought by the appellant against the appellee to compel the appellee, a justice of the peace, to enter up a proper judgment for costs, and issue a writ for the collection thereof.

The appellant filed his complaint in the circuit court in two paragraphs. The appellee demurred to the second paragraph. The record shows the sustaining of the demurrer to both paragraphs, and exceptions. Judgment upon demurrer in favor of the appellee.

This appeal is prosecuted, and the ruling of the court assigned as error.

It appears by the facts alleged in the complaint that William G. Engle, appellee, is a justice of the peace in Sullivan County; that one Hoke brought a suit before said justice against the relator on a promissory note; that relator demanded a jury, and the cause was tried by a jury on September 5, 1887, and the jury disagreed and was discharged. No further proceedings were had in the case, and on the eighth day of November, 1887, in the absence of the parties to the suit, the justice entered a dismissal of the cause, and entered the same on his docket as follows: —

"November 8, 1887. The above cause is hereby dismissed for want of prosecution. W. G. ENGLE, Justice."

That the relator had no notice or knowledge of the dismissal of said suit until on the twenty-seventh day of January, 1888, when a fee-bill was issued by said justice against him for the costs made by him; that thereupon relator immediately demanded of the justice that he tax all of the costs in said cause to the plaintiff therein, and issue an execution

Am. Dec. 355, and note. A justice of the peace may be compelled by *mandamus* to make entries in his docket in accordance with the facts: *State* v. *Van Ells*, 69 Wis. 19. A writ of *mandamus* will issue to compel a lower court to act: *Commonwealth* v. *McLaughlin*, 120 Pa. St. 518; *Dorr* v. *Hill*, 62 N. H. 506. The writ will issue to compel a lower court to perform a manifest duty, if it be not judicial or discretionary: *People* v. *District Court*, 14 Col. 396.

McLAUGHLIN *v.* ETCHISON.

[127 INDIANA, 474.]

JUDGMENT OF CONVICTION ERRONEOUS BECAUSE AFFIDAVIT upon which the prosecution was based did not charge a public offense is not void, where the justice entering the judgment had jurisdiction of the subject-matter and of the person of the defendant.

HABEAS CORPUS. — THAT A JUDGMENT OF CONVICTION IS ERRONEOUS because the affidavit on which it was founded does not state a public offense does not entitle the defendant to be discharged upon *habeas corpus*.

HABEAS CORPUS. — Though it is the duty of a justice, on the conviction of the defendant, if he does not immediately pay the fine imposed, to commit him to jail, still the failure to commit him at once does not deprive the justice of the power to commit him at a subsequent time.

S. A. Forkner, for the appellant.

McBRIDE, J. This was a petition for a writ of *habeas corpus* by the appellant, who alleged that he was unlawfully restrained of his liberty by the appellee, the sheriff of Madison County. A writ was awarded, but, on motion of the appellee, was quashed. This action of the court is assigned as error.

From the petition the following facts are gathered: On the nineteenth day of February, 1891, an affidavit was filed with Benjamin McCarty, a justice of the peace of Madison County, which was evidently drawn under section 2066, Revised Statutes of 1881, charging, or attempting to charge, appellant and another with the erection and maintenance of a public nuisance. On this affidavit a warrant was issued, appellant was arrested and brought before said justice, when he was, on the twentieth day of February, 1891, tried, and adjudged guilty, and a fine of ten dollars and costs assessed against him, with an order that he stand committed until the fine should be paid or replevied. He was allowed to go until the fourth day of March, 1891, when, the fine not being paid or replevied, a *mittimus* was issued by the justice, and he was committed to the common jail of Madison County.

His conviction was clearly erroneous. The affidavit upon which the prosecution was based did not charge a public of-

fense. It is not necessary to point out its defects further than to say that it, at most, charges an interference with the free use by Fraly of his property by the erection of what is styled a "high and useless fence." The facts, properly pleaded in a civil suit, might entitle the party to damages, and to the abatement of the nuisance.

Notwithstanding the judgment of conviction was erroneous, it was not void. The justice had jurisdiction of the subject-matter; that is, he had jurisdiction to hear and determine a charge, under section 2066, Revised Statutes of 1881, of the erection or maintenance of a public nuisance. He also had jurisdiction of the person of the appellant, and the judgment rendered by him cannot be attacked collaterally.

The writ of *habeas corpus* cannot be used for the mere correction of errors. To be entitled to the writ in a case like this, the party complaining must show a void judgment. A judgment that is merely erroneous, no matter how gross the error, will not suffice: *Willis* v. *Bayles*, 105 Ind. 363; Cooley's Constitutional Limitations, marg. p. 348; *Lowery* v. *Howard*, 103 Ind. 440; *Holderman* v. *Thompson*, 105 Ind. 112; *Commonwealth ex rel.* v. *Leckey*, 1 Watts, 66; 26 Am. Dec. 37, and note; 9 Am. & Eng. Ency. of Law, 227, and cases cited; *Ex parte Watkins*, 3 Pet. 193.

Section 1119, Revised Statutes of 1881, provides as follows: "No court or judge shall inquire into the legality of any judgment or process whereby the party is in his custody, or discharge him when the term of commitment has not expired, in either of the cases following: 2. Upon any process issued on any final judgment of a court of competent jurisdiction."

The case at bar comes clearly within the provisions of this statute.

Appellant insists, however, that the *mittimus* is void because not issued until the fourth day of March, twelve days after the rendition of the judgment; that because he was not at once committed to jail in default of payment, the justice lost jurisdiction, and could not thereafter issue a valid *mittimus*.

It is the duty of a justice of the peace, if a defendant in a criminal cause does not immediately pay or replevy a fine adjudged against him, to commit him to jail. While this should be done at once, we know of no reason why, if for any reason it is not done, the justice may not issue a *mittimus* thereafter. We think he may. Nor do we think a defendant is in a situation to complain, either of the negligence of the

justice or of the indulgence extended to him by giving him time, without bail, for the payment of money which is immediately due.

Appellant complains that the justice, by allowing him to go, misled him, and induced him to believe no effort would be made to enforce the judgment, and that for this reason he did not appeal within the time limited by law. If this was the motive which led the justice to delay issuing the *mittimus*, it was of course very reprehensible, but cannot affect the question before us.

The court did not err in quashing the writ.

Judgment affirmed, with costs.

HABEAS CORPUS, TO WHAT EXTENT CAN JUDGMENTS BE REVIEWED ON: See extended note to *Commonwealth* v. *Lecky*, 26 Am. Dec. 40-49. A judgment erroneous, but not void, sentencing a prisoner does not entitle him to a discharge on *habeas corpus: In re Graham*, 74 Wis. 450; 17 Am. St. Rep. 174; *Barton* v. *Saunders*, 16 Or. 51; 8 Am. St. Rep. 261; *Platt* v. *Harrison*, 6 Iowa, 79; 71 Am. Dec. 389, and note; in which case it was also held that while the preliminary examinations of magistrates might be reviewed on *habeas corpus*, their convictions could not.

JURISDICTION, WANT OF, ONLY QUESTION FOR REVIEW ON HABEAS CORPUS. — Questions involving a want of jurisdiction by the court rendering the judgment may be reviewed on *habeas corpus: Ex parte Shaw*, 7 Ohio St. 81; 70 Am. Dec. 55; *In re Allison*, 13 Col. 525; 16 Am. St. Rep. 224, and note. Irregularities not going to the jurisdiction of the court cannot be inquired into on *habeas corpus: Ex parte Fil Ki*, 79 Cal. 584; *Ex parte Brandon*, 49 Ark. 143; and the court may amend irregularities: *In re Thompson*, 9 Mont. 381. Commitment for a wrong offense will not entitle a prisoner to discharge on *habeas corpus: Ex parte Keil*, 85 Cal. 309. But where the facts charged and proved do not constitute a public offense, the prisoner will be discharged: *Ex parte McNulty*, 77 Cal. 164; 11 Am. St. Rep. 257, and note.

GREENWALDT *v.* MAY.

[127 INDIANA, 511.]

JUDGMENT — RELIEF IN EQUITY — FRAUD IN TAKING JUDGMENT FOR COSTS AFTER SETTLEMENT OF PLAINTIFF'S DEMAND. — If a defendant pays the amount of the plaintiff's demand, and enters into an agreement for the dismissal of the action, and thereafter subpœnas witnesses, and causes judgment to be entered against the plaintiff for the costs of procuring them, he is guilty of fraud, and the enforcement of the judgment will be enjoined in equity, if the plaintiff has no remedy in the original action.

O. L. Ballou, H. G. Zimmerman, and F. M. Prickett, for the appellants.

P. V. Hoffman, for the appellee.

ELLIOTT, J. The appellee brought this suit to enjoin the collection of an execution issued by a justice of the peace, and obtained a perpetual injunction.

The facts as they appear in the special finding may be thus summarized: The appellee sued out a *capias ad respondendum* against the appellant, on which the latter was arrested and brought before the justice of the peace by whom the writ was issued. Various intermediate steps were taken in the case, but it is not important to notice them in detail. On the twenty-fourth day of September, 1887, the appellant paid the claim on which the action wherein the writ was issued was founded, and at that time the appellee agreed to dismiss the action. After the payment of the claim, and after the agreement to dismiss was made, the appellant caused a subpœna to be issued for three witnesses, all members of his own family, and residents of a county adjoining the one in which the action was brought. The appellee did not see the justice of the peace until the fifth day of October, 1887, the day prior to the time the cause was set for trial, and the justice of the peace then informed him that the subpœna had been issued, whereupon the appellee informed the justice of the agreement to dismiss the case, and directed him to enter a judgment dismissing it at his, the appellee's, costs. On the sixth day of October the appellant appeared with his witnesses, and, finding that an entry of dismissal had been made, caused the witnesses he had subpœnaed to demand their fees and mileage. The justice taxed fees, mileage, and costs, as directed by the appellant. Before the commencement of the present suit the appellee paid all fees and costs except the fees and costs of the witnesses just mentioned. The appellant caused the execution which is sought to be enjoined to be issued for the purpose of enforcing collection of the costs and fees taxed after the order of dismissal was entered.

In our opinion, the appellee was entitled to the relief awarded him. The judgment for costs was procured by fraud. A party who pays a claim, and enters into an agreement providing for a dismissal of the action brought on the claim is guilty of a fraud if he subsequently causes witnesses to be subpœnaed and costs to be taxed against his adversary: *Nealis* v. *Dicks*, 72 Ind. 374; *Johnson* v. *Unversaw*, 30 Ind. 435; *Stone* v. *Lewman*, 28 Ind. 97; *Pearce* v. *Olney*, 20 Conn. 544; *Chambers* v. *Robbins*, 28 Conn. 552; *Rogers* v. *Gwinn*, 21 Iowa, 58; *Hibbard* v. *Eastman*, 47 N. H. 507; 93 Am. Dec. 467. As the

judgment for costs was obtained by fraud, equity will enjoin its collection, for the justice of the peace had no authority to review his own judgment on the ground of fraud. A justice of the peace possesses no equity jurisdiction, and cannot set aside or annul his judgment, except in the mode provided by statute, and the statute does not authorize him to review a judgment: *Ainsworth* v. *Atkinson*, 14 Ind. 538; *Snell* v. *Mohan*, 38 Ind. 494; *Richards* v. *Reed*, 39 Ind. 330; *Doyle* v. *State ex rel.*, 61 Ind. 324; *Brown* v. *Gobls*, 97 Ind. 86. The jurisdiction of equity was rightly invoked in this instance, for the reasons that there was fraud and that there is no adequate remedy at law. If the original action had been brought in a court invested with jurisdiction to correct or review its own judgments and orders, we should have a very different question. Here, however, the appellee could not secure relief before the justice of the peace, and we must adjudge that it can be awarded him by equity, or else we must adjudge that he is remediless. The case of *Martin* v. *Pifer*, 96 Ind. 245, is not in point, for the reason that in this case the judgment was obtained by fraud and was entered after the action had been dismissed.

If there had been a trial in this case a different question would arise; but there was no trial, for the order on which the execution issued was entered after the plaintiff had dismissed his action.

Judgment affirmed.

JUDGMENT — RELIEF AGAINST, IN EQUITY. — A fraud practiced in the procurement of a judgment will furnish grounds for attacking it in a collateral proceeding: *Mayor etc. of New York* v. *Brady*, 115 N. Y. 599; *Murphy* v. *De France*, 101 Mo. 151; *Hass* v. *Billings*, 42 Minn. 63; *Stone* v. *Stone*, 131 Ill. 309. Fraud or irregularity in procuring a judgment, not apparent in the record, must be attacked in a new and independent action: *Smith* v. *Fort*, 105 N. C. 446. A court of equity limits its interference with the enforcement of judgments at law to cases where the injured party has no redress in court of law, or was prevented from availing himself of it through fraud; *Phillips* v. *Pullen*, 45 N. J. Eq. 5.

HOVEY v. STATE.

[127 INDIANA, 583.]

MANDAMUS WILL NOT LIE TO COMPEL THE GOVERNOR OF A STATE TO ISSUE A COMMISSION to one who has been elected to a public office.

MANDAMUS WILL NOT ISSUE TO CONTROL THE GOVERNOR OF A STATE in the matter of the discharge of any of the duties pertaining to his office as governor. Therefore, if he decides not to issue a commission to one who has been elected to a public office, his decision is final.

A. C. Harris, for the appellant.

J. D. New, W. New, J. E. McDonald, J. M. Butler, and A. H. Snow, for the appellee.

COFFEY, J. This was a suit instituted by the appellee, in the Marion circuit court, against the appellant, as the governor of the state, to compel the latter, by *mandamus*, to issue to the relator, William A. Schuck, a commission as the duly elected auditor of Jennings County. The complaint alleges, among other things, that the relator was duly elected to the office of auditor of Jennings County, at the regular election held in the month of November, 1890; that the votes were duly canvassed, and the proper returns made out and filed in the office of the secretary of state, within ten days after the date of said election, by which it appears that the relator was duly elected auditor of said county by a majority of thirty-nine votes; that on the twenty-fourth day of November, 1890, the relator demanded of the appellant, at the office of the governor, in the city of Indianapolis, his commission as such auditor, but the appellant refused, and still refuses, to issue and deliver to him said commission.

To the alternative writ of mandate the governor filed a return, consisting of two paragraphs. In the first paragraph it is averred, among other things, that on the tenth day of August, 1885, the relator herein was appointed treasurer of Jennings County, and held that office until the eighteenth day of November, 1886; that on the eighth day of November, 1890, the treasurer of Jennings County filed with the appellant, as the governor of the state, an official affidavit stating that the relator had failed to account for and pay over public moneys received by him as such treasurer, in the sum of $1,884.06; that the auditor's term in said county began on the thirteenth day of November, 1890; that the matter of said defalcation was known to the voters throughout said county on the day of election; and that on the seventeenth day of November, 1890.

one Cope, who was an opposing candidate for said office, and who received the next highest number of votes to the relator, filed with the appellant, as such governor, a demand, stating that the relator, by reason of said facts, was ineligible to said office, and that he, the said Cope, was elected and entitled to the commission; that on the twentieth day of November, 1890, the relator paid to the treasurer of Jennings County the sum of $2,357.66 on said defalcation, but neglected to pay the interest and penalty thereon.

The governor asked that Cope be made a party, with liberty to interplead with the relator and try the question as to which, if either, was entitled to the commission and to have the office.

The court struck out that portion of the return which sought to make Cope a party, and the appellant excepted.

The appellee then replied to the return, among other things, that when he retired from the office of treasurer of Jennings County, on the eighteenth day of November, 1886, he made settlement with the board of commissioners of said county, and paid over to his successor in office all moneys found to be due from him as the treasurer of said county, and took a receipt therefor; that he believed said settlement was correct; that if a mutual mistake did occur in said settlement, the amount paid by him on the twentieth day of November, 1890, was more than sufficient, as he believed, to cover all amounts found due upon a judicial investigation.

After this reply was filed, the appellant added a third paragraph to his return, which, in addition to the averments above set out, averred also that the commissioners of said county had appointed Daniel Bacon and Frank F. Frecking, two competent men, to examine the books and papers in the treasurer's office during the time the relator was treasurer of said county; that on December 16, 1890, they reported that after a careful examination of the books, papers, and accounts, they found that, at the expiration of his term of office, there was a balance due from the relator to said county of $4,854.84.

To this answer the appellee replied substantially as in the reply above referred to, adding that the relator did not believe there was any shortage; that if there was, he was ready to pay the same; that no other sum had ever been demanded of him than $2,357.66 until the twenty-second day of December, 1890, when a further claim was made for $2,497.18; that the

sum he had paid in would, upon investigation, be found to exceed any shortage against him.

The appellant filed a demurrer to each paragraph of the reply. The court overruled the demurrer to the replies, and carried it back and sustained it to the answer. The appellant declining to amend, the appellee had judgment as prayed, from which this appeal is prosecuted.

The case has been ably presented, both by oral argument and by the briefs filed in the cause; and we are urged to decide, — 1. As to whether the case is one in which *mandamus* may be maintained; and 2. As to what is the proper construction of article 2, section 10, of our state constitution.

The first question presented is, in our opinion, the controlling question in the case; for if the governor cannot be mandated in the matter involved in this suit, then the second question does not arise, and anything we might decide in relation to it would be without binding force.

As the writ of *mandamus* will not issue to compel the doing of a thing which is discretionary, it follows also that if the case before us is one where the governor may be compelled to act, he has no discretion to be exercised, and the writ should issue without regard to the construction to be placed upon the constitutional provision above referred to.

It is plain, therefore, that the second question suggested is of but little, if any, importance in the controversy now before us. We proceed, therefore, to an examination of the question as to whether the case is one in which the governor of the state may be compelled by *mandamus* to act.

The question as to whether the chief executive of a state is subject to the control of the courts by means of the writ of *mandamus* is not new, nor is it without numerous authorities.

Some conflict is found to exist in the adjudicated cases, but it is believed that such conflict arises more from the different provisions of state constitutions and the particular facts in each case than from a difference of opinion, as the general rules by which such cases are governed. Not only is there some apparent conflict in the cases, but the text-writers do not entirely agree upon the question as to whether the courts possess the power to control the acts of the governor in any particular case.

Mr. Moses, in his work on *mandamus*, after a somewhat elaborate discussion of the question, and an admission that

the courts have no power to control the action of the chief executive of a state in the discharge of his ordinary official duties, nor to compel him to perform any act over which he has the right to exercise his judgment or discretion, reaches the conclusion that the better doctrine is, that he may be compelled by *mandamus* to perform a duty clearly defined and enjoined by law, and which is merely ministerial in its nature, and neither involves any discretion nor leaves any alternative: Moses on Mandamus, 80, 82.

Mr. Wood, in his valuable work on *mandamus*, etc., reaches directly the opposite conclusion, and maintains that an attempt on the part of the courts to interfere with the discharge of executive duties is not only in opposition to our theory of government, and in excess of their power, but is also attended with great danger. In discussing the question, he says: "If the courts may interfere with the discharge of any ministerial duties of the executive department of the government, they may interfere with all, and we should have the singular spectacle of a government run by the courts instead of the officers provided by the constitution. Each department of the government is essentially and necessarily distinct from the others, and neither can lawfully trench upon or interfere with the powers of the other; and our safety, both as to national and state governments, is largely dependent upon the preservation of the distribution of power and authority made by the constitution, and the laws made in pursuance thereof": Wood on Mandamus, 2d ed., 88.

Of the adjudicated cases upon the subject now under discussion, the case of *People ex rel.* v. *Governor*, 29 Mich. 320, 18 Am. Rep. 89, is perhaps one of the leading cases. In that case it was urged that the act which appellant sought, by *mandamus*, to compel the governor to perform was not to be done in the performance of an executive duty imposed by the constitution, but was an act in its nature a ministerial act, provided for by statute, and which might, with equal propriety, have been required of an inferior officer who, beyond question, could have been compelled by *mandamus* to take the necessary and proper action in the premises, and it was argued, for that reason, that the courts possessed the power to control the governor's action by a writ of *mandamus*.

In answer to this argument, Judge Cooley, who delivered the opinion of the court, said: "But when duties are imposed upon the governor, whatever be their grade, importance, or

nature, we doubt the right of the courts to say that this or that duty might properly have been imposed upon a secretary of state or a sheriff of a county, or other inferior officer, and that inasmuch as in case it had been so imposed there would have been a judicial remedy for neglect to perform it, therefore there must be the like remedy when the governor himself is guilty of a similar neglect. The apportionment of power, authority, and duty to the governor is either made by the people in the constitution, or by the legislature in making laws under it; and the courts, when the apportionment has been made, would be presumptuous if they should assume to declare that a particular duty assigned to the governor is not essentially executive, but is of such inferior grade and importance as properly to pertain to some inferior office, and consequently, for the purposes of their jurisdiction, the courts may treat it precisely as if an inferior officer had been required to perform it. To do this would be not only to question the wisdom of the constitution or law, but also to assert a right to make the governor the passive instrument of the judiciary in executing its mandates within the sphere of his own duties. Were the courts to go so far, they would break away from those checks and balances of government which were meant to be checks of co-operation, and not of antagonism or mastery, and would concentrate in their own hands something, at least, of the power which the people, either directly or by the action of their representatives, decided to intrust to the other departments of the government."

The case of *Bates* v. *Taylor*, 87 Tenn. 319, is in point here. In that case Bates sought to enjoin the governor from issuing a certificate of election to H. Clay Evans, and to compel him, by *mandamus*, to deliver a certificate of election which had been made out and signed by the governor, and attested by the secretary of state, as evidence of the fact that Bates had been elected.

In that case the court, by Caldwell, J., said: "The issuance of such commission or certificate, whether called a ministerial or an executive duty, is an official action, whose performance can be neither coerced nor restrained by the courts. An attempt on the part of the courts to control his [the governor's] action under this statute would be an invasion by one department of the government of the rights of another department, and for that reason a violation of sections 1 and 2 of article 11 of the constitution, which are in the following language: —

"'Section 1. The power of the government shall be divided

into three distinct departments, — the legislative, executive, and judicial.

"'Sec. 2. No person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the others, except in the cases herein directly permitted.'"

Many cases are to be found in which it is held that the governor of a state cannot be compelled by *mandamus* to perform a ministerial duty, among which are *Hawkins* v. *Governor*, 1 Ark. 570; 33 Am. Dec. 346; *State* v. *Governor*, 25 N. J. L. 331; *People ex rel.* v. *Bissell*, 19 Ill. 229; 68 Am. Dec. 591; *Petition of Dennett*, 32 Me. 508; 54 Am. Dec. 602; *Mauran* v. *Smith*, 8 R. I. 192; 5 Am. Rep. 564; *Jonesboro etc. T. Co.* v. *Brown*, 8 Baxt. 490; 35 Am. Rep. 713; *State* v. *Towns*, 8 Ga. 360; *People ex rel.* v. *Yates*, 40 Ill. 126; *Pacific Railroad* v. *Governor*, 23 Mo. 353; *State ex rel.* v. *Warmoth*, 22 La. Ann. 1; 2 Am. Rep. 712; *Rice* v. *Austin*, 19 Minn. 103; 18 Am. Rep. 330; *Appeal of Hartranft*, 85 Pa. St. 433; 27 Am. Rep. 667; *State ex rel.* v. *Drew*, 17 Fla. 67; *People ex rel.* v. *Cullom*, 100 Ill. 472.

On the other hand, many cases are to be found in which it is held that the courts possess jurisdiction to compel the chief executive of a state to perform an act which is purely ministerial in its nature, among which are *State* v. *Governor*, 5 Ohio St. 528; *Bonner* v. *State ex rel.*, 7 Ga. 473; *Cotten* v. *Ellis*, 7 Jones, 545; *Chamberlain* v. *Sibley ex rel.*, 4 Minn. 309; *Magruder* v. *Swann*, 25 Md. 173. The case of *Chamberlain* v. *Sibley ex rel.*, 4 Minn. 309, was overruled, however, by the later case of *Rice* v. *Austin*, 19 Minn. 103; 18 Am. Rep. 330.

The cases above cited, as well as all others of the same import, seem to rest chiefly upon the *dictum* of Chief Justice Marshall in the case of *Marbury* v. *Madison*, 1 Cranch, 137. The case of *Marbury* v. *Madison*, 1 Cranch, 137, was an action brought by Marbury and others to compel President Jefferson's Secretary of State, Mr. Madison, to deliver to the plaintiffs their commissions as justices of the peace in the District of Columbia. They had been appointed and confirmed during the administration of President Adams, and their commissions had been signed and sealed. The action was brought in the supreme court of the United States, and it was held that the court did not have original jurisdiction in the cause. This being true, of course all that is said in the case upon any subject other than that bearing upon the

question of jurisdiction is mere *dictum;* but what is said in the opinion upon other subjects, coming, as it does, from such an eminent source, is entitled to great weight, though not having the force of an adjudication. Assuming that all said in the case is a correct exposition of the law upon the subject of *mandamus*, we must keep in mind the fact that it was not a suit against the President of the United States, but a suit against the Secretary of State, and the language used must be construed with reference to the case then before the court.

We are not justified in assuming that Chief Justice Marshall would have used the same, or similar, language had the action been brought against the President of the United States; nor do we think the case is in point in an action against the chief executive of a state. It does apply, however, in an action against the secretary, auditor, or treasurer of a state, or other administrative officer. The cases, therefore, above cited, resting upon the case of *Marbury* v. *Madison*, 1 Cranch, 137, in which it is held that the chief executive of a state may be compelled by *mandamus* to perform ministerial duties, rest upon authority which does not sustain the conclusion reached, and should not be followed.

It is claimed by the appellee that the question of the power of the courts in this state to compel the governor, by *mandamus*, to perform merely ministerial duties is settled, and the cases of *Governor* v. *Nelson*, 6 Ind. 496, *Biddle* v. *Willard*, 10 Ind. 62, *Baker* v. *Kirk*, 33 Ind. 517, and *Gray* v. *State ex rel.*, 72 Ind. 567, are relied on to sustain this contention.

In the case of *Governor* v. *Nelson*, 6 Ind. 496, the parties sought to obtain a construction of certain constitutional and statutory provisions, and no question relating to the power of the courts to compel the governor to act was presented to the court or decided.

In the case of *Biddle* v. *Willard*, 10 Ind. 62, the writ was denied, and the question of jurisdiction was not raised or decided by the court.

The case of *Baker* v. *Kirk*, 33 Ind. 517, was submitted to the court upon an agreed statement of facts, and sought to obtain a construction of certain statutory provisions relating to the election of directors of the state prison south, and no question was made or decided as to the power of the court over the acts of Governor Baker.

The case of *Gray* v. *State ex rel.*, 72 Ind. 567, was brought against the governor, the attorney-general, the secretary of state, and the treasurer of state, to compel them to redeem a certain bond, under the provisions of an act approved December 12, 1872. In that case the point was made that the governor could not be compelled by *mandamus* to act; but this court said: "The governor and the other officers named in the act may well be regarded as constituting a board, organized by the legislature for the performance of certain duties; and a mandate will lie against them to enforce the performance of the duties prescribed." This branch of the case proceeds upon the theory that executive duties can be performed by the governor alone, and that as the act constitutes him a member of a board, where he is required to act with others, his duties cannot be said to pertain to the executive department of the state.

It is unnecessary that we should express our approval or disapproval of this case, as it must be apparent to every one, upon a moment's reflection, that the case before us is distinguished from this case, and rests upon entirely different principles.

We do not think the cases cited settle the question in this state that the courts have the power to compel the governor, by writ of *mandamus*, to perform any act enjoined upon him, either by the constitution or laws of the state, where such act pertains to a duty to be performed by him as the governor of the state. If such power exists, we must look elsewhere than to the decisions of this court to find it. It cannot exist unless it is conferred by the constitution of the state, or unless it is one of the inherent powers of the courts.

Our state constitution, article 3, section 1, is as follows: "The powers of the government are divided into three separate departments, — the legislative, the executive (including the administrative), and the judicial; and no person charged with official duties under one of these departments shall exercise any of the functions of another, except as in this constitution expressly provided."

This provision does not differ materially, in legal effect, from the provision above copied from the constitution of the state of Tennessee. Under this provision of our constitution above quoted, it has been said by this court that the powers of the three departments of state are not merely equal, — they are exclusive in respect to the duties assigned to each. They

are absolutely independent of each other. They are equal, co-ordinate, and independent. This division of power prevents the concentration of power in the hands of one person or class of persons: *Wright* v. *Defrees*, 8 Ind. 298; *Lafayette etc. R. R. Co.* v. *Geiger*, 34 Ind. 185; *State ex rel.* v. *Denny*, 118 Ind. 382; *City of Evansville* v. *State ex rel.*, 118 Ind. 426; *State ex rel.* v. *Denny*, 118 Ind. 449; *State ex rel.* v. *Noble*, 118 Ind. 350; 10 Am. St. Rep. 143.

In the last case cited it was held that neither the legislative nor the executive departments of the state could interfere with the duties or functions of this court.

It is true that the legislative department may increase or diminish the jurisdiction of the court, and may, within the terms of the constitution, prescribe rules of practice. It is within the province of the courts to expound and enforce such laws as the legislative department may enact within the constitutional limit, and to decline to enforce such as are in conflict with the constitution. It is within the province of the executive department of the state to discharge such duties as are imposed upon it by the constitution of the state, and such as may be imposed by valid enactments of the legislative department. In each of these cases the department acting, or declining to act, is within its legitimate sphere; and if either department fails to perform its duty, the remedy is not to be found in the attempt of some other department to perform such duties.

Such attempt would be usurpation, more dangerous to free government than the evil sought to be corrected. Should we attempt to control the governor in the matter of the discharge of any of the duties pertaining to his office as governor, we would be taking one step in the direction of absorbing the functions of the executive department of the state. This we should not do, unless the case before us is such that we are driven to such course by an unbroken chain of precedents in like cases from which there is no escape.

The case before us, as we understand the pleadings, is this: At the November election in 1890, the relator received the highest number of votes for the office of auditor of Jennings County, which fact was duly certified to the secretary of state. Prior to the time the relator called for his commission, the treasurer of Jennings County filed with the governor an affidavit to the effect that the relator, prior to his election, had been the treasurer of said county, and had failed to account

for a large amount of the funds which had come into his hands as such treasurer. Subsequently, Mr. Cope appeared and claimed that he was elected to the office for which the relator demands a commission, upon the ground that the relator was ineligible to the office, which fact was known to the electors of Jennings County at the time of the election, and that he, Cope, received the next highest number of votes for the office. Under these facts, the governor decided not to issue any commission.

We think the governor's decision in this manner must be taken as final. The case is not one where the governor is acting as the member of a board created by legislative enactment, in a matter wholly disconnected with his functions as governor of the state, but it is a case where he is required to act as governor. It is his office as chief executive of the state that gives force and vitality to the commission. He executes it as the governor of the state of Indiana; and whether he derives his power to do so from the constitution of the state or by legislative enactment, without the office of chief executive behind it, it is of no validity.

Having reached the conclusion that the courts of this state have no power to control the governor in matters of the kind before us, and that the conclusion of the governor in the particular here involved is final, it follows that the circuit court erred in overruling the demurrer of the appellant to the replies, and in sustaining it to the answers.

Judgment reversed, with directions for further proceedings not inconsistent with this opinion.

MANDAMUS — POWER OF COURTS TO ISSUE MANDAMUS TO CONTROL THE ACTS OF A GOVERNOR. — The supreme court has no jurisdiction to issue a writ of *mandamus* to compel the governor of a state to grant a commission to a subordinate functionary: *Hawkins* v. *Governor*, 1 Ark. 570; 33 Am. Dec. 346, and extended note. Judiciary have no control or revisory power over questions which it is the duty and within the power of the governor of the state to decide, and from which there is no appeal: *Miles* v. *Bradford*, 22 Md. 170; 85 Am. Dec. 643; *State* v. *Board*, 42 La. Ann. 647; *State* v. *Braden*, 40 Minn. 174; *Devin* v. *Belt*, 70 Md. 352.

The governor is subject to *mandamus* to compel him to perform ministerial acts, but the performance of discretionary acts cannot be compelled by the courts: *Pacific R. R.* v. *Governor*, 23 Mo. 353; 66 Am. Dec. 673, and note.

CASES

IN THE

SUPREME COURT

OF

MICHIGAN.

McDuff *v.* Detroit Evening Journal Company.

[84 Michigan, 1]

Libel — Evidence of Special Damages. — The fact that a published article is libelous *per se* does not, of itself, render evidence of special damages, or of specific acts of others towards plaintiff in consequence of the publication, admissible, unless alleged in the complaint.

Libel — Measure of Damages. — In the absence of an allegation of special damage in libel, plaintiff is presumed to rest content with such damages as are the natural result of the libelous publication upon his character, reputation, and feelings, without proof of specific facts; and such damages, coupled with damages for the malice or want of malice with which the article was published, are all that he is entitled to recover or prove, unless special damages are alleged.

Libel — Measure of Damages. — Under an allegation of general damages only in libel, the issue is, What damages has the plaintiff suffered generally in the community where he is known by the publication of the libelous article? and not what he has suffered in individual instances, where those who have known him have treated him differently from what they did before.

Evidence — Proof of Written Communication. — A witness cannot testify to facts communicated by him by letter to another, when the letter itself can be produced.

Libel — Evidence. — In an action of libel founded on a newspaper article, an editorial in another paper upon the same subject-matter as that in suit, but not shown to be the basis therefor, or to have any connection therewith, is inadmissible, and error committed in admitting it is not cured by subsequently striking it out.

Practice — Conduct of Court and Counsel. — When a judge expresses an opinion on any disputed fact, or of the character of a witness, or compliments one attorney at the expense of another, or uses language which tends to bring an attorney into contempt before the jury, he commits error for which the verdict and judgment will be set aside.

Practice — Offer of Proof, when Improper. — When objection to a question has been sustained, counsel should not be allowed to state in the presence of the jury what he can or proposes to prove if allowed to do so, and it is reversible error for the court to refuse to instruct the jury to disregard such offer of proof.

Wilkinson and Post, and Levi T. Griffin, for the appellant.

James H. Pound, for the respondent.

GRANT, J. This is an action of libel, in which the plaintiff recovered verdict and judgment, and defendant appeals.

The libelous article is as follows: "Humane Agent Vhay is investigating the case of Andrew McDuff [meaning the plaintiff], 73 Beech Street, who is charged with having got away with the property of his father and mother, who are now said to be starving in a Jones Street attic."

Other publications subsequent to this, upon the same subject, were introduced by plaintiff, under objection, and he then introduced evidence tending to show the falsity of the libelous article. Testimony was introduced on the part of the defendant tending to prove the truth of the charge, and good faith in its publication. The issue in the case was as clear and simple as can well be imagined. If the charge was not true, then the article was libelous. The questions to be submitted to the jury were,—1. The truth of the libelous article; 2. If not true, the amount of damages suffered; 3. The good faith of the defendant, in mitigation of damages.

1. The first point raised in defendant's brief is, that the cause should not have been submitted to the jury at all. This point was not raised in the court below, and is not assigned as error, and therefore cannot be considered here.

2. The following questions were asked the plaintiff, and answered, under objection:—

"Q. Has there been any difference whatever in the treatment, since the publication of these articles, by any of your acquaintances from what there was before?"

"Q. Will you tell us in what the difference consisted?"

This testimony was objected to, for two reasons: 1. Because it involved special damages not alleged in this declaration; 2. The questions were not confined to the libelous publication declared on, but involved damages resulting from other publications.

Both objections were well taken. The allegation of damages in the declaration is as follows: "He, the said plaintiff, has been and is greatly injured in his good name, fame, credit, and reputation, both as an individual and as such trustee, and brought into public scandal and disgrace, is suspected to have been guilty of the misconduct charged upon and imputed to him as aforesaid, and has been greatly vexed,

harassed, oppressed, and impoverished, and hath been and is otherwise much injured."

No special damages are alleged,—only general damages, in the general and usual language of declarations in libel cases.

The article is libelous *per se;* but that, of itself, does not render evidence of special damages, or of specific acts of others towards plaintiff, in consequence of the publication, admissible, unless alleged in the declaration. Whenever a plaintiff alleges no special damages, he is presumed to rest content with those damages which are the natural result of the libelous publication upon his character and reputation and feelings, without proof of specific facts. He is presumed to have a good reputation and character. The damages he is entitled to recover are the result of the natural injury to these and to his feelings, coupled with the malice, or want of malice, with which the article was published. These the defendant is prepared to meet. He cannot be prepared to meet special instances of slight, avoidance, loss of hospitality on the part of friends and acquaintances, from whatever part of the world the plaintiff may choose to bring witnesses or to testify himself. If plaintiff desires to recover for damages for such special injuries, he must allege them: *Bassil* v. *Elmore*, 65 Barb. 627; *Terwilliger* v. *Wands*, 17 N. Y. 57; 72 Am. Dec. 420; *Dicken* v. *Shepherd*, 22 Md. 399; Folkard's Starkie on Slander and Libel, sec. 378, and cases there cited.

The rules of pleading are founded upon reason and fairness. The issue in ordinary lawsuits is limited. The parties are more or less familiar with the transactions involved, and the defendant may fairly be presumed to have some knowledge of the testimony against him, and what witnesses he can produce to meet it. In a libel suit, under an allegation of general damages only, the issue is, What damages has the plaintiff suffered generally in the community where he is known by the publication of the libelous article? and not what he has suffered in individual instances, where those who have known him have treated him differently from what they did before. In the latter case, if he wishes to recover damages, he must allege them. No other rule would be fair and reasonable: *Davies* v. *Solomon*, 41 L. J. Q. B. 10. In that case, the allegation was, that the plaintiff had ceased to receive the hospitality of divers friends, naming them. It is laid down in Folkard's Starkie on Slander and Libel, section 634, that "a plaintiff, under an allegation of general injury,

may show a general diminution of business; but if he seeks specific damages, he must give specific evidence."

An examination of some of the records in libel suits heretofore decided by this court has convinced me that this has been understood by the profession to be the rule. In *Weiss* v. *Whittemore*, 28 Mich. 374, it was decided that, under the allegation of a general loss of trade, the names of the customers driven away or lost need not be mentioned. But the court held: "The general allegation of the loss of trade is sufficient, and the declaration may be supported by evidence of such general loss."

It was held in *Bourreseau* v. *Detroit Evening Journal Co.*, 63 Mich. 437, 6 Am. St. Rep. 320, that it was not competent for the defendant to prove distinct facts that had not been made part of the issue as framed, and that no one could be prepared in advance to anticipate every fact, true or false, which might be offered in evidence, and of which plaintiff had no notice. The evidence on the part of the plaintiff must be governed by the same rule as on the part of the defendant; and if the defendant cannot introduce specific facts without pleading them in justification, for the same reason the plaintiff should not be permitted to prove them; otherwise there would be one rule of evidence for the plaintiff, and another for the defendant. Briefly stated, the rule is, that the allegation of general damages will admit only general proof.

3. Plaintiff was one of the trustees of the estate of Andrew McDuff. He was not living in Detroit at the time he was made trustee. One McFedries, a son-in-law of Andrew McDuff, was asked the following question: "You did send for Gilbert McDuff to come here and take charge of this estate?"

This was objected to as irrelevant and incompetent, the request, if any, having been made by letter. Plaintiff's counsel then offered some letters written by the witness to plaintiff, which the counsel himself said he did not think were admissible. After considerable discussion by counsel, the court asked the witness the following questions: —

"Q. You did send for Gilbert McDuff to come here and take charge of this estate? A. I did, most emphatically.

"Q. Did you consult with his father and mother before you sent for him? A. Yes, sir.

"Q. How did you communicate with him? A. In writing the letter."

Thereupon counsel for defendant moved to strike out the

answers and questions, to which motion the court replied: "I am going to let them stand, if they are the only answers in the case."

The testimony was both irrelevant and incompetent. So far as the management of the estate by plaintiff was concerned, it was of no consequence how he came to take charge of the estate; but if material, the letters were the only competent evidence of the fact.

4. Another witness for plaintiff was asked the following question: "That part of the article published in the Detroit Evening Journal of February 1, 1888, stating 'who are said to be starving in a Jones Street attic,' referring to the mother and father of the plaintiff,—is it true, or untrue?"

This question was for the determination of the jury from the facts placed by the evidence before them. It called for the opinion of the witness from the facts within her knowledge. These facts it was competent to testify to. The conclusion was for the jury, and not for her. The answer called for her opinion, which was clearly improper.

5. A copy of the Omaha Herald was introduced, containing the following: "Andrew McDuff, of Detroit, who had amassed a fortune, had not been seen for about ten years, till recently found by an agent of the Humane Society. He was confined in a cold and filthy room, without food or sufficient covering. Probably the relatives who have been living off Mr. McDuff's money during these ten years thought that such treatment would kill the old man. Now that the unfortunate has been rescued, there only remains the pleasant duty of sending his unnatural son to the penitentiary, which fairly yearns to receive him."

This was objected to, and was finally stricken out by the court. In this connection, a letter from one P. McDuff, a brother of the plaintiff, was introduced, under objection, which contained the following: "Some person unknown to me sent me Omaha Herald for February 4, with a piece on the fourth page marked, which if you think proper to look it up, you will probably excuse my course."

Plaintiff showed no connection between the publication in the Journal and the article in the Omaha Herald, which appeared under the editorial column of that paper, and not as a piece of news obtained from another publication. That article and the letter were clearly inadmissible. The jury very likely presumed that the article in the Omaha Herald was based

upon the article in the journal, but there was no evidence of the fact. Error in admitting such testimony is not cured by striking it out. There may be cases where courts may well say that the jury could not be prejudiced by the admission of incompetent testimony when it is stricken out. In such case it would be error without prejudice, and judgment would not be reversed for that reason. But we cannot apply such ruling to the present case, where the inevitable result of the evidence would be so injurious to defendant.

6. A witness on behalf of the plaintiff was asked: "Now, I would like to know whether any of your customers, that you remember, stated anything with reference to their being moved to tears by this article. A. A lady came into the store and said that her mother read it, and shed tears over it, and felt badly about it, and gave as a reason that she had been a school-mate of his." This testimony was clearly too incompetent, on the ground of hearsay, to merit discussion.

7. The next assignment of error relates to the conduct of the circuit judge upon the trial. To an objection to the admission of testimony made by defendant's counsel, the court said: "I do not want to compliment Mr. Pound, but I am well aware of the fact that Mr. Pound knows how to try a lawsuit."

Mr. Brearley, the manager of the defendant, at the close of his cross-examination, was dismissed by plaintiff's counsel, with the remark: "I think that is all, Mr. Brearley; you can go on and state that I have not cut my eye-teeth again, if you wish."

Defendant's counsel excepted to this remark, to which the court said: "I do not think the papers make fair remarks. I noticed the paper called Mr. Pound 'General.'"

Plaintiff's mother, who was seventy-five years old, was asked if plaintiff had said anything to her about her moving out of the house, and answered: —

"I understood that he wanted me to go to the Old Ladies, Home.

"*The Court.*—Answer the question.

"*Witness.*—I am trying to.

"*Court.*—You are not. I do not hesitate to say it to you, madam."

A colored man by the name of Johnson was a witness for the defendant. He had made a statement which was in direct conflict with the testimony on the part of plaintiff. Plaintiff's

counsel thereupon asked the court to commit the witness for perjury, and stated to the court, in the presence of the jury: "The witness deliberately lied when he said Gilbert McDuff locked his father up in that house."

Defendant's counsel excepted to this language, and the court thereupon said: "I tell you I have a decided opinion of this man's testimony, and I intend, in my charge to the jury, to call their attention to his testimony. The manner in which this man swore yesterday is something I shall never live long enough to forget. And put this in the record, if it ever gets out of the court-room, and keep it there: A man who will do as he did, and point out a man under the solemnity of oath, and swear that a certain man paid $1.10, — I say, sir, I have my opinion about it, and a decided opinion of it."

Defendant's counsel objected to this statement, and stated that the court had no business to make such a remark from the bench; to which the court replied: "I have. Take your exception. I have; and I will say more, if you want it."

And in charging the jury, the judge said of this witness: "I think it my duty to charge you that in regard to his evidence I have a decided opinion."

With the propriety of such conduct and language we have nothing to do. Our only province is to determine whether they amount to a legal error; and however unpleasant the duty may be in such cases, we must not shrink from performing it. Whatever language may be used by counsel in the heat of trial, it is the legal duty of the judge to preside and decide with impartiality, and to keep counsel within proper bounds. Appellate courts must presume that one occupying so important a position as that of circuit judge can influence a jury. It is their duty to follow his instructions as to the law. Whenever he expresses an opinion on any disputed fact, or of the character of a witness, or compliments one attorney at the expense of the other, or uses language which tends to bring an attorney into contempt before the jury, or uses any language which tends to prejudice them, he commits an error of law for which the verdict and judgment must be promptly set aside. Appellate courts cannot correct mistakes of fact. Trial courts, therefore, cannot be too circumspect and careful to see that questions of fact are submitted to the unbiased judgment of the jury, which, under our jurisprudence, are for their sole determination. To sanction such conduct and language as the above by the circuit judge would

tend to render trials a farce, and result in a denial of justice. Language less open to criticism has been held error by this court: *Wheeler* v. *Wallace*, 53 Mich. 355; *Cronkhite* v. *Dickerson*, 51 Mich. 177; *People* v. *Hare*, 57 Mich. 505.

8. The witness Peter McDuff was asked by plaintiff's counsel, on cross-examination, if he had not taken a lewd woman into his house. This, upon objection, was excluded, whereupon plaintiff's counsel stated that if counsel for defendant would withdraw his objection, he could prove it by this man's sister. The court refused to instruct the jury that the remarks were improper, and that they should pay no attention to them. It was error on the part of counsel to make the remarks. No verdict should be allowed to stand in the face of such statement to prejudice the jury, and to get the full effect of excluded evidence before them. It is never proper practice, when an objection to a question has been sustained, for counsel to state in the presence of the jury what he can or proposes to prove if allowed to do so. After it was made, the court could not well have done less than to instruct the jury to disregard it.

It is alleged that errors were committed in instructing the jury upon the measure of damages. What we have already said upon the question of special damages renders any discussion of these instructions unnecessary. Under the repeated decisions of this court upon this subject, no difficulty can exist in properly instructing a jury. The rules governing this case are laid down with clearness and precision in *Scripps* v. *Reilly*, 38 Mich. 10.

Judgment must be reversed, with costs of both courts, and a new trial ordered.

LIBEL — NECESSITY FOR AVERMENT OF SPECIAL DAMAGES. — When a publication is libelous *per se*, no special damages need be alleged: *Morasse* v. *Brochu*, 151 Mass. 567; 21 Am. St. Rep. 474; *Morey* v. *Morning J. Ass'n*, 123 N. Y. 207; 20 Am. St. Rep. 730, and note; unless the plaintiff seeks to recover special damages in addition to his general damages: Note to *McAllister* v. *Detroit F. P. Co.*, 15 Am. St. Rep. 339; note to *Terwilliger* v. *Wands*, 72 Am. Dec. 428.

EVIDENCE. — SECONDARY EVIDENCE IS NOT ADMISSIBLE until the nonproduction of the primary evidence has been accounted for: *Georgia P. R'y Co.* v. *Strickland*, 80 Ga. 776; 12 Am. St. Rep. 282.

CORBETT v. LITTLEFIELD.

[84 MICHIGAN, 30.]

CHATTEL MORTGAGE. — Removal to another state of mortgaged chattels by the mortgagor in whose possession they were left subjects them to attachment by his creditors in the state to which they were removed, though the mortgage was duly recorded in the state where it was given, and the chattels were removed without the mortgagee's knowledge or consent.

CHATTEL MORTGAGE — RECORD AS NOTICE. — The recording of a chattel mortgage in one state has no extraterritorial force in another state as notice of a lien.

Sloman, Berry, and Duffie, for the appellant.

George W. Radford, for the respondent.

LONG, J. This is an action of replevin to recover possession of two horses known as "Tommy Linn" and "Dan D." The action is brought against the defendant, sheriff of Wayne County, who held them under three writs of attachment issued against the goods and chattels of Clifton E. Mayne. The cause was tried in the Wayne circuit court before a jury, where the plaintiff had verdict and judgment for six cents damages, he having taken the property under the writ.

The plaintiff, on the trial, claimed to be entitled to the possession of the property by virtue of a chattel mortgage given by Clifton E. Mayne, the defendant in the attachment suits. The mortgage was given on July 15, 1887, to George E. Barker, and assigned by Barker to the plaintiff on May 2, 1888. At the time the mortgage was given, Mayne, the mortgagor, resided at the city of Omaha, Douglas County, Nebraska, and Barker, the mortgagee, resided at the same place. The mortgage covered other property besides these two horses, and the property is described in the mortgage as being upon the ranch of C. E. Mayne, called the "Platte Valley Stock Ranch," in township 16 north, range 9 east, of Douglas County, Nebraska. The mortgage was duly filed in the office of the county clerk of Douglas County, Nebraska, on October 1, 1887.

The statute of Nebraska authorizing the filing in the county clerk's office was offered in evidence, and is as follows: "Every mortgage, or conveyance intended to operate as a mortgage, of goods and chattels hereafter made which shall not be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the

creditors of the mortgagor, and as against subsequent purchasers and mortgagors [mortgagees] in good faith, unless the mortgage, or a true copy thereof, shall be filed in the office of the county clerk of the county where the mortgagor executing the same resides, or in case he is a non-resident of the state, then in the office of the clerk of the county where the property mortgaged may be at the time of executing such mortgage; and such clerk shall indorse on such instrument or copy the time of receiving the same, and shall keep the same in his office for the inspection of all persons; and such mortgage or instrument may be so filed, although not acknowledged, and shall be valid as if the same were fully spread at large upon the records of the county."

At the time the mortgage was assigned by Barker to Corbett, the two horses in question, and also a horse known as "Dr. West," were out of the state, in the possession of a man named Newbro, who had them in the trotting circuits for Mayne in the different states. They have never been returned to Nebraska, and were on the trotting circuit in Michigan at the time they were attached for the debts of Mayne.

On June 12, 1888, it is claimed, Mayne sold the horses to one John Riley, and gave Riley a bill of sale, subject to the chattel mortgage then held by Corbett; and Riley made an agreement, it is claimed, with Corbett to release the chattel mortgage on the horses by the payment of one thousand dollars; and it was claimed on the trial that Riley had possession of the horses at the time they were attached. It also appears that on May 1, 1888, an agreement was entered into between Corbett and Mayne, by which Mayne acknowledged the validity of the claims for which the mortgage was given, and authorized Corbett to purchase them.

On the part of the defendant it was contended, — 1. That the mortgage was fraudulent in fact; 2. That even if not fraudulent in fact, it was void as to those attaching creditors of Mayne, for the reason that it was not filed in Detroit or in Michigan; 3. That the bill of sale to Riley was nothing more than a mortgage, and a fraudulent one at that.

These were the issues which were presented to the court and jury. On the trial below, many of the questions raised were questions of fact which, under the charge of the court, were fairly submitted to the jury for determination. Sixteen requests were presented by defendant's counsel to the court to give in charge to the jury, the most of which relate to the

necessity of the refiling of the mortgage in this state. Some of those were covered by the general charge of the court, and others were not given and were refused.

The important question in the case arises under the defendant's second point, that the mortgage was not filed in this state, and many of the requests to charge were aimed at this point. The court, in its charge to the jury, giving construction to the Nebraska statute relative to chattel mortgages, directed the jury that they must hold the chattel mortgage as fraudulent and void, as the property remained in the possession of the mortgagor, unless the plaintiff had shown by a preponderance of evidence that it was an honest security, and not taken with intent to hinder, delay, or defraud the creditors of Mayne; but if they found that the agreement of May 1, 1888, between Corbett and Mayne, by which Corbett was induced to purchase the mortgage, was executed in good faith, for the purpose of procuring Corbett to purchase the mortgage, then, though the mortgage was fraudulent in its inception as between Barker and Mayne, the mortgage as to Corbett would be valid, if Corbett, relying upon the representations made in the agreement, and acting in good faith, purchased it.

The court further, in its charge, speaking of the Michigan statute relative to the filing of chattel mortgages, directed the jury that though they found the mortgage valid in the hands of Corbett, yet if he permitted the property to be brought into this state, it then became subject to the levy of the attachments in the hands of the sheriff, and the chattel mortgage would be no protection to the plaintiff, as the mortgage was not filed within this state; but that if the property was brought out of the state of Nebraska, and into the state of Michigan, without the knowledge or consent of Corbett, and as soon as he found that it had been brought out of that state and into this, he took steps to reclaim it, then his rights as mortgagee would be preserved.

Upon the question of the rights of Mr. Riley under the bill of sale, the court directed the jury that if the bill of sale was made in good faith, and not with intent to hinder, delay, or defraud creditors, and that, acting under the conveyance, Riley took possession of the horses in this state, that would end the case, though the chattel mortgage was fraudulent and void as between Corbett and Mayne, as they could not be attached for the debts of Mayne, though the sheriff would then

be entitled to nominal damages. Substantially, these are the material parts of the charge.

The jury, by their verdict, have found that the property was brought out of the state of Nebraska and into this state without the knowledge or consent of Corbett. The question is therefore presented, whether this chattel mortgage can be held to protect the plaintiff's rights in the property, even though not filed within this state, by reason of the bringing of the property out of Nebraska and into this state without the knowledge or consent of the mortgagee.

Our statute (Howell's Statutes, sec. 6193), like the Nebraska statute, provides that such conveyances shall be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, unless filed, where there has been no delivery of the property to the mortgagee, and that followed by an actual and continued change of possession of the thing mortgaged. The filing, to be effective, must be in the town clerk's office, or city clerk of the city, or recorder of the city having no officer known as "city clerk," where the mortgagor resides, except when the mortgagor is a non-resident of the state, in which case the mortgage is to be filed in the clerk's office where the property is. The relation between the mortgagor and mortgagee is that of debtor on one side and creditor on the other, secured by a lien upon the property of the debtor. The title to the property can only be divested by foreclosure or some act equivalent thereto.

It may be true that this mortgage lien was valid in Nebraska, and might have been enforced there as against creditors, or even purchasers in good faith. It is the duty of courts to extend the principles of comity to our sister states, and to recognize generally the existence of liens under foreign statutes. But we are asked to give this mortgage priority of lien over the attachment levies. The recognition of the existence and validity of such liens by the foreign state is not to be confounded, however, with the giving them a superiority or priority over all other liens and rights justly acquired in this state merely because the former liens in the state where they first attached have there, by force of their statute, a superiority or priority. This distinction was pointed out by Chief Justice Marshall in delivering the opinion of the court in *Harrison* v. *Sterry*, 5 Cranch, 289. He there said: "The law of the place where a contract is made is, generally speaking, the law of

the contract; i. e., it is the law by which the contract is expounded. But the right of priority forms no part of the contract itself. It is extrinsic, and is rather a personal privilege, dependent on the law of the place where the property lies, and where the court sits which is to decide the cause."

There is no provision of our statute by which this mortgage, at the time of its execution, could have been filed in this state, and the Nebraska statute did not authorize it, and even if it had, it would not have had any force beyond the sovereignty enacting it. The mortgagor then resided in Nebraska, and the property was situate there. It would be unreasonable to require a citizen of Michigan to take notice of the files and entries in Nebraska. These notices have no extraterritorial force: *Montgomery* v. *Wight*, 8 Mich. 143. The mortgage having been properly filed under the statutes of Nebraska, the lien thereby created would undoubtedly have been held by the courts of that state as prior to any lien which creditors might acquire, if the mortgage was not fraudulent in fact, though the mortgagor retained possession of the property mortgaged. But by the terms of the mortgage, the mortgagee had a right at any time to take possession without notice, and Corbett, by the assignment, acquired all the rights which Barker had. Instead of taking possession, he permitted the property to remain in the possession and under the control of the mortgagor, thereby clothing him with all the *indicia* of ownership. This ownership, however, was subject to the lien of the mortgage so long as the property was kept in Nebraska, as the filing of the mortgage there was notice of the lien. But when the property is moved into a foreign state, the filing in Nebraska cannot be said to be notice to creditors of the mortgagor in such foreign state of the lien of the mortgage, as that statute has no extraterritorial force.

The court was in error in holding that the property being brought out of Nebraska and into this state without the knowledge and consent of Mr. Corbett, such fact would give the mortgage lien priority over the attaching creditors. That question arose in *Boydson* v. *Goodrich*, 49 Mich. 66, and was expressly ruled the other way. In that case, the plaintiff resided in Indiana. Warren, the mortgagor, also resided there, and the mortgage was given there. Without the knowledge or consent of the plaintiff, Warren, the mortgagor, brought the property into this state, and sold it. In an action of replevin against the purchaser, it was said by this court:

"Counsel for plaintiff argues that the rules of state comity are against the defendant, and give the foreign transaction preference. But the law seems to be settled otherwise in *Montgomery* v. *Wight*, 8 Mich. 143. The plaintiff allowed the mortgagor to retain possession, and to appear to the world as well authorized to convey an unencumbered title, and no means of information were provided in this state to impeach this appearance."

In the present case, it appears from the very terms of the mortgage that Mr. Gorbett had it in his power to protect himself by taking possession of the mortgaged property. This he failed to do, but permitted the property to remain in the possession of the mortgagor, relying upon the filing of his mortgage as notice, under the Nebraska statute, sufficient to protect his lien. It can have no such effect here as against the creditors of the mortgagor, and the court should so have instructed the jury. We find no error in the other portions of the charge. We need not discuss the other questions raised.

The judgment must be reversed, with costs.

CHATTEL MORTGAGE — CONFLICT OF LAWS. — A chattel mortgage on property in Indiana, executed and recorded in another state, but not recorded in Indiana, and never delivered to the mortgagee, is invalid as against attaching creditors: *Ames Iron Works* v. *Warren*, 76 Ind. 512; 40 Am. Rep. 258.

WESTERN WOODEN-WARE ASS'N *v.* STARKEY.

[84 MICHIGAN, 76.]

CONTRACT IN RESTRAINT OF TRADE. — An agreement between manufacturers of wooden-ware, located in different states, by which one of them agrees to sell to the other, and not engage in the same business in eight specified states for five years thereafter, nor to allow the premises formerly occupied by him to be used for the purpose of manufacturing wooden-ware, nor to sell them to be used for that purpose, without the consent of the purchaser, is void, and unenforceable, as being in restraint of trade and contrary to public policy.

Hatch and Cooley, for the appellant.

T. W. Whitney, for the respondents.

LONG, J. The bill in this cause is filed for the purpose of having the defendants Starkey, Ferris, and Olmsted enjoined from engaging in the business of manufacturing pails, tubs, and other articles of wooden-ware, during the period of five

years from June 29, A. D. 1888; to enjoin the other defendants from carrying on that business with them; and to enjoin all the defendants from using certain premises in the village of St. Louis, Gratiot County, for the purpose of manufacturing tubs, pails, etc. The bill asks for an accounting touching complainant's damages, for a decree requiring the same to be paid, and there is also a prayer for general relief.

The bill shows that the complainant is a corporation organized under the laws of the state of Illinois for the purpose of carrying on the business of manufacturing, buying, and selling wooden-ware and the materials which enter into wooden-ware; that it was engaged in the business prior to June 29, 1888; that on that date the defendants Starkey, Ferris, and Olmsted were doing business at St. Louis, as partners, under the name of the St. Louis Wooden-ware Company; that they were engaged in business similar to that of complainant, and owned and occupied certain premises, with a manufacturing establishment, and were possessed of a large quantity of manufactured articles, materials, tools, and other chattels used in their business; that on that date the complainant and the members of said copartnership entered into a contract, which is attached to the bill, the material parts of which will be referred to. By this contract the firm, in consideration of six thousand dollars, agreed to sell to the complainant their stock on hand, materials, tools, implements, and chattels. The contract contains this clause: "And said first parties also agree not to become engaged in the manufacture of tubs and pails during the next five years in the states of Michigan, Wisconsin, Illinois, Minnesota, Iowa, Missouri, Indiana, or Ohio, or allow their property at St. Louis, Michigan, to be used for that purpose, nor to sell said property to any one for that business, except by consent of said second parties; and in case any of the parties of the first part violate this agreement, they do hereby agree to pay to said second party two thousand dollars for damages for violating this contract."

The contract also contains certain other provisions, not necessary here to be noticed. After making the contract, the complainant paid the copartnership the six thousand dollars, and received the chattels. The defendants Starkey, Ferris, and Olmsted violated the contract, in that they are now engaged in manufacturing and selling wooden-ware in the premises in question, and, as the bill alleges, have confederated with the other defendants, Palmerton, Fowler, and Newman,

to carry on the business with them, and, for the purpose of concealing their transactions, procured the defendants Palmerton, Fowler, and Newman to organize a corporation under the name of the F. G. Palmerton Wooden-ware Company, Limited, with intent to engage in said business.

The bill further charges that the defendant Starkey pretended to convey the lands in question to his son-in-law, Palmerton; that Palmerton has conveyed them to the Palmerton Wooden-ware Company, and that the business of manufacturing wooden-ware has been carried on on said premises by the Palmerton Wooden-ware Company; that the defendants Starkey and Ferris have active supervision, control, and management of said corporation, and have been making sales of their pails and tubs in all the states of Michigan, Minnesota, Wisconsin, Illinois, Iowa, Missouri, Indiana, and Ohio. The bill charges that the corporation so organized by the defendants is a mere pretense and cover procured to be organized by the defendants Starkey and Ferris; that Starkey and Ferris furnish the capital therefor; that the stock of the corporation is held for their benefit and advantage; that the breach of the contract on the part of the defendants has greatly injured and damnified the complainant.

To this bill the defendants filed a general demurrer, which the circuit judge sustained, and on March 14, 1890, entered a decree dismissing the bill. From this decree complainant appeals.

Complainant's counsel raised but three questions in this court: 1. That the clause of the contract wherein the defendants Starkey, Ferris, and Olmsted agree not to become engaged in the manufacture of tubs, etc., during the next five years in any of the eight states named, or permit the premises in question to be used for that purpose without the consent of the complainant, is valid; 2. That the clause of the contract which provides, "in case any of the parties of the first part violate this agreement, they do hereby agree to pay to said second party two thousand dollars for damages for violating this contract," does not preclude the complainant seeking relief by injunction; 3. That act No. 225, Laws of 1889 (3 Howell's Statutes, secs. 9354 j–9354 p), declaring certain contracts, agreements, undertakings, and combinations unlawful, and providing punishment for those who shall enter into the same, or do any act in the furtherance thereof, has no application in this case.

Counsel for complainant contend, under their first proposition, that this covenant is limited in respect to time; that it is also limited in regard to territory,—that is, to Michigan and the seven other states named; that it is a covenant embodied in the contract, by which contract the defendants Starkey, Ferris, and Olmsted sell certain property, the price being fixed at one sum both for the value of the property and for the covenant; that how much of this price is applicable to the property sold, and how much to the covenant not to engage in business, neither the contract nor the circumstances enable us to say; but that it would be presumed that by reason of the covenant a larger price was paid by the complainant than would be necessary merely to cover the value of the property sold. Counsel insist that this question has been settled decisively by this court, and in support of that proposition cite *Hubbard* v. *Miller*, 27 Mich. 15; 15 Am. Rep. 153; *Beal* v. *Chase*, 31 Mich. 490. Counsel also contend that the rule laid down in *Beal* v. *Chase*, 31 Mich. 490, is approved in *Doty* v. *Martin*, 32 Mich. 462; *Caswell* v. *Gibbs*, 33 Mich. 331; *Grow* v. *Seligman*, 47 Mich. 610; 41 Am. Rep. 737; *Watrous* v. *Allen*, 57 Mich. 366; 58 Am. Rep. 363.

From the view we take of this case, we need discuss but one question. The contract must be declared void on the ground of public policy. The cases cited by counsel for complainant do not sustain the doctrine they contend for here. This case does not fall within that class of cases where contracts have been upheld though the parties, by the contract, were to abstain from carrying on the same business for a particular length of time and within a designated territory. In *Hubbard* v. *Miller*, 27 Mich. 15, 15 Am. Rep. 153, the complainant was engaged in carrying on the business of a general retail hardware-store in the city of Grand Haven, including the tubing and all necessary apparatus and tools for sinking drive-wells, and was also carrying on the business of putting down drive-wells. Two of the defendants, Miller and Decker, partners under the firm name of George W. Miller & Co., kept a like hardware-store in the same city, and, like the complainant, kept on hand the tubing and other materials used in putting down such wells, and were also engaged in putting them down for those who chose to employ them. Complainant purchased the stock, tools, etc., of the defendants Miller and Decker, and paid their price, on condition that they would cease to do that kind of business, and would not keep

well-drivers' tools and fixtures. The defendants violated this contract. The firm of George W. Miller & Co. was dissolved, and afterwards reorganized, with the defendant Akeley as a member of the firm. The new firm shortly after went into business, and kept the same kind of tools and materials as complainant, and carried on the well-driving business. Defendant Decker went into business for himself, and also carried the same line of stock, and commenced putting down drive-wells. It is true that this court, on the hearing here, granted a perpetual injunction. But Chief Justice Christiancy, who wrote the opinion in the case, said: "Whether it [the contract] can be supported or not depends upon matters outside of and beyond the abstract fact of the contract or the pecuniary consideration. It will depend upon the situation of the parties, the nature of their business, the interests to be protected by the restriction, its effect upon the public,—in short, all the surrounding circumstances; and the weight or effect to be given to these circumstances is not to be affected by any presumption for or against the validity of the restriction. If reasonable and just, the restriction will be sustained; if not, it will be held void."

The court construed this contract as limited to the city of Grand Haven and vicinity. It will be noticed that the circumstances surrounding that case and the situation of the parties show that the complainant purchased a business which was similar to the one which he was then carrying on, and which he continued to carry on thereafter, in the same place. The public may have been as well served by this means as though the two or three firms continued the business.

In *Beal* v. *Chase*, 31 Mich. 490, to which the learned counsel refer as sustaining their position, it appears that Chase was the publisher of a receipt-book, and carried on the business of printing. Chase sold to Beal his printing establishment, the receipt-book and copyrights, the good-will of the business, and the right to use the name of Dr. Chase in connection with the book and business, and agreed not to engage in the business of printing and publishing in the state of Michigan so long as Beal remained in the printing and publishing business at Ann Arbor. The whole business was turned over to Beal, and he was to fulfill all contracts entered into by Dr. Chase, and was to furnish the paper, the Courier and Visitant, to all subscribers, etc. It appears that the business was to be carried on as Chase had carried it on, and the property purchased was

devoted to the business in which it had theretofore been used; it was not, like the present case, closed up and taken out of the channels of business; and the court upheld and enforced the contract which the parties themselves had made.

The complainant here is a corporation organized and existing under the laws of the state of Illinois, and having its place of business in Chicago. It is alleged in the bill that it is organized for the business of manufacturing, buying, and selling pails, tubs, and other articles of wooden-ware, and manufacturing, buying, and selling staves, heading, hoops, and other materials which enter into their manufacture, and also for the owning and operating machinery, tools, and implements connected with and used in the manufacture of pails, tubs, and other articles of wooden-ware; that it is extensively engaged in such business; and that it sells its products in the eight great states named. It is not alleged by the bill that in the making of the contract the complainant intended to take the business and good-will of Starkey, Ferris, and Olmsted, and carry on the business of manufacturing these articles in this state; but from the terms of the contract it is manifest that it not only intended to take these parties out of the manufacturing business, but to ship the machinery which was used for that purpose out of the state, and close the doors of the shops. Complainant did not purchase the realty. It purchased all the machinery there in use, and the contract shows that it was to be taken down and placed on board the cars. The interests of the parties alone are not the sole considerations involved here. It is the duty of the court to see that the public interests are not in any manner jeopardized. The state has the welfare of all its citizens in keeping, and the public interest is the pole-star to all judicial inquiries.

Here a large manufacturing business had been established, and presumably it gave employment to quite a number of people. By the contract these people are thrown out of employment, and deprived of a livelihood, and no other of the citizens of Michigan are called in to take their places. The business is no longer to be carried on here, but is removed out of the state. The parties are not only bound by the contract, if valid, not to manufacture here for a period of five years, but in seven other of the states of the great Northwest, teeming with its millions of people. If the complainant could enforce this contract against Starkey, Ferris, and Olmsted, and shut the doors of that shop, and prohibit their

again opening them for five years in any one of those states, they could as well make valid and binding contracts to shut the shop of every manufacturing institution in the state, and in the other seven states, and compel the parties now owning and operating them to remain out of business for a term of years, and hold the doors of these shops shut during such period; for the contract which complainant seeks to enforce provides that these parties shall not allow their property to be again used for that purpose within the time limited, nor sell it to any one for that business, except by consent of the complainant, and this under a penalty of two thousand dollars.

A somewhat similar question arose in *Wright* v. *Ryder*, 36 Cal. 342; 95 Am. Dec. 186. There a contract had been entered into for the purchase by the Oregon Steam Navigation Company of the California Steam Navigation Company of a steamboat called the New World, for the sum of seventy-five thousand dollars, and also an agreement by the Oregon Steam Navigation Company that the steamboat should not be run upon any of the routes of travel on the rivers, bays, or waters of the state of California for the period of ten years thereafter. The validity of this contract was before the court, it being claimed that it was void on the ground of public policy, and it was held void, the court there saying: "If the California Steam Navigation Company, which now occupies our bays, rivers, and inlets with its fleet of steamboats, should suddenly convey them all to a purchaser on condition that they were not to be employed in navigating any of the waters of this state for a period of ten years, no one could doubt that this would operate as a great present calamity to the public, and the condition would be void as a restraint upon trade. On the other hand, if a sloop or schooner of fifty tons burden should be sold on a similar condition, the injury to the public would be scarcely appreciable. In like manner, if all the carpenters and masons in a large city should bind themselves not to prosecute their business in this state for a period of ten years, it might produce great public inconvenience; whereas, if only one carpenter or mason should enter into a similar contract, the loss of his services might not be felt by the public. And yet, in the latter case, we would be bound by a long line of adjudications in England and America to hold the contract void, as in restraint of trade."

In the present case, the defendants Starkey, Ferris, and Olmsted were not only to remain out of such business for the

full time specified, but the premises which had been used to carry on the manufacturing by them, though not sold and conveyed under the contract, could not be again used for such time by them or any other party for the same business. I do not think it needs the citation of authorities to show that contracts of this nature have frequently been condemned by the courts, and held void, as unreasonable restraints of trade, and therefore void on the ground of public policy.

The decree of the court below must be affirmed, with costs.

CONTRACTS IN RESTRAINT OF TRADE. — As to what contracts are void as in restraint of trade, and what are not, see *Newell* v. *Meyendorff*, 9 Mont. 254; 18 Am. St. Rep. 733; *Moore etc. Hdw. Co.* v. *Towers Hdw. Co.*, 87 Ala. 206; 13 Am. St. Rep. 23, and note; *Santa Clara etc. Co.* v. *Hayes*, 76 Cal. 387; 9 Am. St. Rep. 211, and note; note to *Angier* v. *Webber*, 92 Am. Dec. 751–765. A contract made by a merchant, with a purchaser of his stock of goods and of his good-will, not to engage in business of the same kind in the same city for a certain time is valid, and not in restraint of trade: *Thompson* v. *Andrus*, 73 Mich. 551.

KALAMAZOO HACK AND BUS COMPANY *v.* SOOTSMA.

[84 MICHIGAN, 194.]

COMMON CARRIERS — RIGHT TO CONTROL DEPOT GROUNDS — UNJUST DISCRIMINATION. — A railroad company can make all needful reasonable rules and regulations concerning the use of its depot and grounds, and may exclude all persons therefrom who have no business with the railroad or the passengers going to or coming from the trains or depot, and prohibit all persons from soliciting business for themselves upon its premises; but it cannot arbitrarily admit one carrier of passengers or freight to its depot or grounds, to the exclusion of all others, for no other reason than that it is for its own pleasure or profit so to do.

COMMON CARRIERS — RIGHT TO DISCRIMINATE BETWEEN HACKMEN. — A railroad company cannot, upon any pretense, except of wrong or misconduct on the part of the person excluded, grant to one hackman, or line of hacks and omnibuses, the exclusive right to occupy a place upon its depot grounds, nor can it set aside the most favorable part of such grounds to a hack and omnibus company engaged in carrying passengers and freight, to the exclusion of others engaged in the same business. A grant of such privilege is an unjust discrimination, tending to defeat competition and to create a monopoly.

Osborn and Mills, for the appellant.

Hawes and Luby, for the respondent.

MORSE, J. The Kalamazoo and Hastings Construction Company, a limited copartnership, operating the Chicago, Kalamazoo, and Saginaw Railway, being in the actual occupancy

of a piece of land used by it as depot grounds in the city of Kalamazoo, leased to the plaintiff, also a limited copartnership, operating a hack and bus line in said city, a certain portion of said premises, described in the lease as "that piece of ground lying and being between the sidewalk on the east side of Walbridge Street and the side-track of the Chicago, Kalamazoo, and Saginaw Railway, in said city, being seventy feet in length from the south end of the depot there situate, said piece or parcel of ground to be occupied by said second parties for the purpose only of an omnibus, baggage-wagon, and hack stand, at and about the time of the arrival and departure of trains upon said railway; provided, said second parties shall permit the United States mail-wagon and the American Express Company's wagon, doing business in the city of Kalamazoo, to stand and occupy that portion of said piece or parcel of land which shall be assigned for that purpose by Lewis Sergeant, for the term of two years, commencing on the twenty-first day of July, 1890, and ending on the twenty-first day of July, 1892."

Lewis Sergeant allotted the mail and express wagons twenty feet of ground immediately south of the depot. He also posted in two conspicuous places, upon and adjacent to the depot, the following notice: —

"CHICAGO, KALAMAZOO, AND SAGINAW RAILWAY CO.
"GENERAL OFFICE.
"KALAMAZOO, MICH., July 21, 1890.

"Notice to whom it may concern.

"The Kalamazoo Hack and Bus Co. have leased that piece of ground which lies within a distance of seventy (70) feet immediately south of depot at Kalamazoo, and between side-track and sidewalk on east line of Walbridge Street. Said lease contains provision that Bus Co. will assign place on this ground for American Express Co., and mail-wagon.

"L. SERGEANT, Sup't C., K., & S. R'y."

Mr. Sergeant also informed the hack and bus men generally that the ground described in said lease had been leased exclusively to the hack and bus company (the plaintiff), and that others must keep off. It also appeared that previous to the making of this lease this ground had been occupied by all the hack and bus men in the city, the defendant, among others, having been in the habit of going upon this ground and standing indiscriminately about the depot seeking passengers.

On August 1, 1890, the defendant, Sootsma, placed his hack upon the grounds so leased to plaintiff, and, upon being requested to move therefrom, refused to do so. He remained there until an incoming train, and obtained a passenger, and drove away with him. The plaintiff thereupon commenced suit in trespass against Sootsma in justice's court, which resulted in judgment for defendant. Plaintiff appealed to the circuit court, where the circuit judge directed a verdict in favor of the defendant, on the ground that the lease was invalid, as opposed to public policy; that the lessor had no right to grant the exclusive use of the land to the plaintiff for the purposes mentioned in the lease.

There was some contention in the court below, and in this court, regarding the right of plaintiff to bring an action of trespass under this alleged lease, the defendant claiming that it was a mere license conveying no property in the soil. In the view we take of the case, this question does not become material.

The plaintiff gave evidence in its behalf, upon the trial in the circuit, tending to show that, in the selling by the construction company of tickets upon its road to points upon other roads west of Kalamazoo, a coupon was attached to the ticket entitling the passenger to transfer, with baggage, across the city of Kalamazoo to the railway station at which the journey was to be resumed, and that an arrangement had been entered into with the plaintiff to perform such service, and carry such baggage and passengers; that prior to the making of the lease, there had been trouble between the hackmen and the busmen at the depot. Hackmen not connected with plaintiff's line in some instances solicited and secured passengers, who supposed they were to be carried on these transfer coupons, and at the end of the trip refused to accept such coupons, and charged them for so carrying them. This made trouble between the railroad company and passengers, and also was the cause of disorder and quarrels between the various hack and bus men about the depot, and the lease was made to avoid such trouble and annoyance. It was not shown, however, that defendant had ever been engaged in any quarrels, or that he had refused to carry passengers upon such coupons, or had solicited passengers with the idea that he would carry them upon the coupons, and then refused to accept them, and demanded at the end of the trip other compensation for carrying them. But it is no matter for what purpose this lease was made, as

long as no improper action upon the part of the defendant was shown to have induced it.

The granting of this exclusive privilege to occupy this favored spot of ground, and one theretofore used customarily by all hackmen and busmen, to the plaintiff, was a discrimination against the defendant, as well as all other hackmen and busmen not in the employ or service of the plaintiff, thus giving to the plaintiff a monopoly of the railroad company's grounds for the standing of hacks and buses, and the solicitation of passengers therefor.

Howell's Statutes, section 3355, provides that "all railroad corporations shall grant equal facilities for the transportation of passengers and freight to all persons, companies, or corporations."

A violation of this statute is punished by a penalty. This statute evidently does not relate entirely to the mere carriage in the cars of the road. To be effective, it must be construed to include, also, not only the receiving of such passengers and freight at its depots, but, as well, the receiving of them by other "persons, companies, or corporations" at the point upon its road where the carriage ends. The access to its depots must be free and equal to all, whether it be to take passage or leave the trains. No railroad company, under this statute, would be permitted to give to one hack and bus company exclusive access to its depots, or even better access than to others, in the carriage of passengers or freights to its trains. Nor can it any more appropriately give such exclusive or better privilege to such company taking passengers or freights from its trains, to be transported from thence elsewhere. Therefore the circuit court was right in directing the verdict as he did.

But, independently of the statute, upon principle, the plaintiff could not recover in this case. A railroad company can make all needful reasonable rules and regulations concerning the use of its depots and grounds, and can exclude all persons therefrom who have no business with the railroad or the passengers going to and coming from the trains or depots, and it probably can prohibit all persons from soliciting business for themselves upon its premises; but it cannot arbitrarily admit one common carrier of passengers or freight to its depots or grounds, and exclude all others, for no other reason than that it is for its own profit or pleasure. Such rules and regulations must touch and affect all alike. It may determine the distance from its depot or track at which persons

soliciting passengers may stand while on its grounds, but this determination must affect and apply to all. To permit a railroad company, upon any pretense, except of wrong or misconduct on the part of the person excluded, to allow one hackman or line of hacks to occupy a place upon its grounds which is denied to another, or to set apart the most favorable ground, as in this case, to one company, and to exclude the others therefrom, would be, in the language of Justice Field in *Old Colony R. R. Co.* v. *Tripp*, 147 Mass. 43, 9 Am. St. Rep. 661, "to enable a railroad corporation largely to control the transportation of passengers and merchandise beyond its own line, and to establish a monopoly not granted by its charter, which might be solely for its own benefit, and not for the benefit of the public."

The rules and regulations of a railroad company in this respect must be not only reasonable, but they must not unnecessarily infringe upon the rights of the public and others having or carrying on business in connection with railroad traffic or travel: *Summitt* v. *State*, 8 Lea, 413; 41 Am. Rep. 637. It has been held, in Massachusetts, that a railroad corporation may contract with one to furnish the means to carry incoming passengers, or their baggage or merchandise, from its stations, and may grant to him the exclusive right there to solicit the patronage of such passengers; but three of the seven members of the supreme court dissented therefrom, giving, it seems to me, much the better reason for such dissent: *Old Colony R. R. Co.* v. *Tripp*, 147 Mass. 35; 9 Am. St. Rep. 661. I can find no other case holding this doctrine. In *Cravens* v. *Rodgers*, 101 Mo. 247, the contrary doctrine is held. The granting to the owner of one bus line the exclusive right to the best part of a railway platform at the depot, and confining a rival line to other parts of the platform, where the chance of getting passengers was not so good, was held to be a discrimination tending to destroy competition and to encourage a monopoly, which is obnoxious to the spirit of our laws, and contrary to the constitution of Missouri, which prohibits "discrimination in charges or facilities in transportation between transportation companies and individuals, or in favor of either." And in *Montana U. R'y Co.* v. *Langlois*, 9 Mont. 419, 18 Am. St. Rep. 745, it is held that a railroad company cannot grant the right to receive and discharge passengers at its platform to one hack-owner, to the exclusion of others. In an able opinion, the case of *Old Colony R. R.*

Co. v. *Tripp*, 147 Mass. 35, 9 Am. St. Rep. 661, is reviewed, and the argument of the majority opinion in that case criticised and controverted. For other cases bearing upon this question, see *Marriott* v. *London etc. R'y Co.*, 1 Com. B., N. S., 499; *In re Palmer*, L. R. 6 Com. P. 194; *In re Parkinson*, L. R. 6 Com.P. 554; *Camblos* v. *Railroad Co.*, 9 Phila. 411; *New England Exp. Co.* v. *Maine Cent. R. R. Co.*, 57 Me. 188; 2 Am. Rep. 31.

While many of the cases above cited are decided in reference to statutes of the same import as our own, it is clear to me that the action of the construction company — railroad company — in this case, in leasing this ground to plaintiff, would, if sustained as valid, tend to encourage and promote a monopoly of carriage of passengers from this depot at Kalamazoo, not only to connecting routes of travel upon other railroads, out of the city, but to places within the city, contrary to the spirit of our laws, and against that public policy that refuses to encourage or foster monopolies in any kind of business.

The plea is made that the railway company, owning these grounds, or having the actual occupancy and possession thereof, has the same right of control over them that any citizen would have under similar circumstances, provided only that it discharges its duties to the public, with reference thereto, as a common carrier. This is true. But when the ground is used in its business as common carrier, and for the purpose of the standing, or "setting" of hacks and buses to solicit the patronage of incoming passengers, then it must use it for the benefit of all, and not for the privilege of one. It could probably refuse, if such refusal was reasonable in that there was other proper ground for them to stand upon, to permit any hacks or buses to occupy the ground at all; but if it opens the door to one, all must enter and have equal facilities and privileges one with the other. No doubt, one wrongfully creating disorder or disturbance upon this ground, or defrauding or deceiving passengers, could be lawfully ejected therefrom, and, persisting in such conduct, be forever barred therefrom by the railroad company; but that would be a matter for the railroad company, rather than the plaintiff. As the case stands, the plaintiff had no better right upon the premises than Sootsma.

The judgment of the court below is affirmed, with costs.

CARRIER OF PASSENGERS — RIGHT TO GRANT EXCLUSIVE PRIVILEGES OR PREFERENCES TO HACKMEN OR OTHER SOLICITORS. — Notwithstanding the serious conflict existing between the authorities upon this subject, we think the better reasoning sustains the doctrine approved in the principal case; namely, that a railway company or other common carrier may exclude all persons from its depot or grounds who are not using or seeking to use its means of carriage, but it cannot grant an exclusive right or more favorable preference to one individual or company engaged in soliciting patronage from its passengers, than it gives to another individual or company engaged in the same line of business. It seems to us that an agreement to grant such exclusive privilege to any one person is contrary to public policy and the spirit of our laws, especially in the face of a statutory or constitutional provision existing in nearly all of the states prohibiting discrimination in charges or facilities for transportation between carriers or individuals, or in favor of either. In the words of Judge Brace in *Cravens* v. *Rodgers*, 101 Mo. 253: "If better facilities are afforded to one carrier than another by the connecting carrier, competition is discouraged, a monopoly created, and the traveling public are apt to receive a slow, uncomfortable, slovenly, negligent, and expensive service. Monopolies are obnoxious to the spirit of our laws, and ought to be discouraged."

In England, under a statute similar in its provisions to those which exist in most of the states of the American Union, the rule is well settled that a railway company cannot exclude one line of omnibuses engaged in bringing and taking passengers to and from the railroad from its station grounds, when other omnibuses engaged in the same business are admitted. In *Marriott* v. *London etc. R'y Co.*, 1 Com. B., N. S., 499, 87 Eng. Com. L. 498, Cockburn, C. J., observed: "I am of opinion that giving an undue and unreasonable preference to and in favor of Williams brings the company within the provisions of the statute. I see no reason why this preference should be given to one omnibus, and to the exclusion of another. I therefore think the rule should be made absolute, to the extent of enjoining the company to admit the complainant's omnibus into the station of this railway at all reasonable times, for the purpose of receiving and setting down passengers and goods, in the same manner and to the same extent as other public vehicles of a similar description are admitted into the yard for that purpose." So in *Palmer* v. *London etc. R'y Co.*, L. R. 6 Com. B., an injunction was granted against the company for refusing to admit vans containing goods to the station-yard for delivery to the company for transportation by it; and in *Parkinson* v. *Great Western R'y Co.*, L. R. 6 Com. B. 554, an injunction was granted against the company for refusing to deliver at the station, to a person authorized to receive them, packages of goods which had been transported on the railroad.

As was remarked in the beginning, the few authorities to be found in the United States on this subject are conflicting. Still, we apprehend that the majority of them, as well as the better reasoning, are in support of the English doctrine above announced. In the late case of *Cravens* v. *Rodgers*, 101 Mo. 247, the owner of an omnibus line constructed an approach to a railroad platform under an oral agreement with the agent of the railroad company that he should have the exclusive use thereof; but the court decided that the company could not grant him such exclusive privilege, so as to limit the teams of a competing line of omnibuses to other parts of the platform, where the opportunities for obtaining passengers were not so favorable. Brace, J., in delivering the opinion, said: "The exclusive privilege which the plaintiffs claim, under their license from the railroad company's station-agent, of oc-

cupying the space beside the railroad platform of easiest approach thereto, next to the station-building, the objective point for the discharge of the railroad passengers, is a valuable one, giving the plaintiffs an advantage in carrying on their business over the defendants, their rivals in the same line of business. The business of both parties is that of common carriers for hire, on the same line, and by their connection with the railroad forming one continuous line, by which passengers are transported to the same general destination, the railroad company carrying them to its station near the city, and the plaintiffs and defendants carrying them to their several destinations in the city. As common carriers, it is the duty of each of the parties to transport all persons who offer to take and pay for passage with them, and they are charged with grave and responsible duties to such persons when they have once taken passage. They must make the trip, whether they have one or many passengers. As a corollary of this duty to carry all, there ought to be a corresponding right upon the part of each to have the same facilities afforded them to obtain the passage in their respective vehicles of such passengers as are brought to the point of connection by the connecting carrier, the railroad company, on the same general route. In this way the enterprise of each is encouraged, competition is stimulated, the price of transportation is kept within reasonable bounds, the safest, best, and most comfortable means of conveyance, a rapid passage, and polite and agreeable service are apt to be secured to the traveling public. On the other hand, if better facilities are afforded to one carrier than another by the connecting carrier, competition is discouraged, a monopoly created, and the traveling public are apt to receive a slow, uncomfortable, slovenly, negligent, and expensive service."

Another late case involving the same principles, and decided the same way, is that of *New England Express Co.* v. *Maine Central R. R. Co.*, 57 Me. 188; 2 Am. Rep. 31. In that case, the railroad company, by agreement, gave to the Eastern Express Company the exclusive right, for four years, to use a certain separate apartment in a car attached to each of its passenger trains for the purpose of carrying an express-messenger and merchandise, and agreed that it would not let any space in its passenger trains during the continuance of such contract to any other express carrier. Before the expiration of the contract, the railroad company refused, upon any terms, to receive the express matter of another express company, when and where they received that of the contracting express company. The court determined that it was not within the power of the railroad company to grant any such exclusive privilege, and that it was liable in damages for so doing. The statute under which that case was decided provided that all engaged in the business of carrying express matter "should have reasonable and equal terms, facilities, and accommodations for the transportation of themselves, their agents and servants, and of any merchandise and other property, upon any railroad owned and operated within the state, and of the use of the depot and other buildings and grounds of such corporation, and at any point of intersection of two railroads reasonable and equal terms and facilities of interchange." An examination will disclose a striking similarity between the terms of this statute and those general statutory provisions of the several states under which cases analogous to the principal case must necessarily be decided; and the court, in referring to the statute quoted, said: "The defendants [the railroad company] cannot object to this statute, unless they had before its passage an unlimited right to impose unreasonable and unequal terms, to give special privileges, to confer monopolies, selecting from the great public, from whom they acquired their powers and franchise, who

shall be the special and selected objects of their bounty, and who shall not. The wildest and most extravagant supporter of vested rights will hardly claim this. It would imply madness or crime on the part of the legislature granting such rights. If, then, the defendants have no such right, the grant of a monopoly to one corporation at the expense of the general public is alike a violation of the common as of the statute law, and cannot be upheld."

In *Sanford* v. *Catawissa etc. R. R. Co.*, 24 Pa. St. 378, 64 Am. Dec. 667, the company sought, by contract, to give an express company the exclusive privilege of transportation on its passenger trains, and the court remarked: "The railroad corporation has no right to do this. The power to regulate the transportation on the road does not carry with it the right to exclude any particular individuals, or to grant exclusive privileges to others. Competition is the best protection to the public, and it is against the policy of the law to destroy it by creating a monopoly of any branch of business. It cannot be done except by the clearly expressed will of the legislative power. If it possessed this power, it might build up one set of men and destroy others; advance one kind of business and break down another; and might make even religion and politics the tests in the distribution of its favors. Such a power in a railroad corporation might produce evils of the most alarming character. The rights of the people are not subject to any such corporate control. Like the customers of a grist-mill, they have a right to be served, all other things equal, in the order of their applications. A regulation, to be valid, must operate on all alike. If it deprives any person of the benefits of the road, or grants exclusive privileges to others, it is against law, and void."

An innkeeper is bound to admit, under proper limitations, travelers and those who have business with them as such, and if he gives a general license to enter his inn to one stage-driver, whose business is connected with his guests in their character as travelers, he cannot lawfully exclude others who are pursuing the same business, and who enter for a similar purpose: *Markham* v. *Brown*, 8 N. H. 523; 31 Am. Dec. 209. In the recent and well-considered case of *Montana etc. R'y Co.* v. *Langlois*, 9 Mont. 419, 18 Am. St. Rep. 745, the exact topic here under discussion received the thoughtful attention of the court, and it was there determined, after a full review of all the authorities, that a general rule or regulation, as applied to the government of the conduct of persons, or of a class of persons, contemplates uniformity, and not discrimination, in its requirements; and a grant by a railway company of a special privilege to a portion of the platform at one of its stations to one hackman, to the exclusion of all others engaged in the same business, is not such a regulation as a common carrier has a right to adopt, either under the provisions of the constitution, or under its power to make and enforce reasonable regulations governing persons coming to its stations and platforms.

Of the cases that maintain the contrary doctrine to that above enunciated, perhaps *Old Colony R. R. Co.* v. *Tripp*, 147 Mass. 35, 9 Am. St. Rep. 661, is the leading one. In that case the court decided that a railroad company may grant to one person who owns a line of wagons the exclusive right of coming upon its grounds to solicit the patronage of incoming passengers with respect to carrying their baggage or merchandise, and may exclude another person owning a wagon from the exercise of such right, notwithstanding a statute providing that "every railroad corporation shall give to all persons or companies reasonable and equal terms, facilities, and accommodations for the transportation of themselves, their agents and servants, and of any merchandise or other property, upon its railroad, and for the use of its depot

and other buildings and grounds." Such statute only applies to relations between railroads, as carriers, and their patrons. This case was decided by an almost equally divided court, four judges concurring in the doctrine here expressed, while three judges concurred in an opinion in support of the rule established by the other cases cited above. The opinion which stands as the judgment of the court has been severely criticised both in *Montana etc. R'y Co.* v. *Langlois*, 9 Mont. 419, 18 Am. St. Rep. 745, and in the principal case. Other cases exist, however, in which the Massachusetts rule is announced. Thus in *Barry* v. *Oyster Bay etc. Co.*, 67 N. Y. 301, 23 Am. Rep. 115, it was determined that a carrier of passengers may establish on his car or vessel an agency for the delivery of passengers' baggage, and may exclude all others who seek to enter or travel thereon for the purpose of competing with such agency. And in *Fluker* v. *Georgia R. R. etc. Co.*, 81 Ga. 461, 12 Am. St. Rep. 328, it was decided that the dominion of a railroad company over its trains, tracks, and right of way was no less complete or exclusive than that which every owner has over his own property. Such company may exclude whom it pleases, when they have come to transact their own private business with passengers or other third persons, and admit whom it pleases when they come to transact such business. This applies to selling lunches to or soliciting orders from passengers for the sale of lunches.

The late case of *Griswold* v. *Webb*, decided by the supreme court of Rhode Island, November 30, 1889, not yet officially reported in the reports of that state, but appearing in 40 Am. & Eng. R. R. Cas. 683, was an action of trespass against a hack-driver for going on a wharf used by a steamboat company, where, by the rules of the wharf, only drivers with licenses could stand their carriages; and it was held a good defense, that he was on the wharf by special contract to get and convey a certain passenger who was to arrive at the wharf by that boat, and that he was not there to solicit business; and although perhaps not necessary to the decision of that case, the court therein said: "We understand the rules to forbid an unlicensed hackney carriage to stand upon the wharf at all; for none are allowed to stand in the roadways, except on the licensed stands, and none are allowed to occupy a stand without a license. But the wharf is leased to a common carrier of passengers, with a provision that the space east of the restaurant shall be reserved for the use of private carriages of passengers arriving at the wharf. The question of right, therefore, is the same as it would be between passengers and a company that owns its terminus. While such ownership carries with it the right of control in most respects the same as in private property, a railroad station or steamboat wharf is in some respects a public place. The public have the right to come and go there for the purpose of travel; for taking and leaving passengers; and for other matters growing out of the business of the company as a common carrier. But the company has the right to say that no business of any other character shall be carried on within the limits of its property. It has the right to say that no one shall come there to solicit trade, simply because it may be convenient for travelers, and so to say that none except those whom it permits shall solicit in the business of hacking or expressing."

PRATT *v.* BURHANS.

[84 MICHIGAN, 487.]

SALES — RETENTION OF TITLE BY VENDOR — RIGHTS OF PURCHASERS. — A contract of sale, by which the title to goods is to remain in the vendor until paid for or sold in due course of trade by the vendee, to whom they are delivered, is valid; and a purchaser from him in due course of trade takes a good title, while others, not so purchasing, cannot rely upon his bare possession as conclusive evidence of title.

SALES — FRAUDULENT REPRESENTATIONS BY VENDOR. — Evidence of false representations made by a vendee as to his financial standing at the time goods are delivered to him, but not relied upon by the vendor in making the delivery, under a contract that the title to them is to remain in the vendor until they are paid for or sold in due course of trade, is immaterial and inadmissible in an action of replevin by the vendor to recover the goods from a third person, who is not a purchaser in due course of trade.

Watson and Chapman, for the appellant.

Lyon and Hackleman, for the respondents.

GRANT, J. Plaintiffs were partners in business in Binghamton, New York, under the firm name of the Binghamton Cigar Company. In November, 1889, Mr. Imhoff, one of the plaintiffs, went to Owosso, Michigan, and entered into an arrangement with the Owosso Cigar Company, a copartnership composed of a Mr. Chase and a Mr. Totten, by which they agreed to send and deliver to them cigars. Mr. Imhoff testifies that plaintiffs agreed to furnish Chase and Totten all the goods they wanted; the title thereto to be retained in plaintiffs until paid for or sold, and when sold, the accounts to belong to them. This was denied by defendant's witnesses.

The defendant, Burhans, had indorsed for Chase and Totten for about six thousand dollars. Plaintiffs shipped goods to Chase and Totten, and shortly after, they turned over all their stock, including the goods furnished by plaintiffs, to defendant, Burhans, and gave him a bill of sale thereof, which defendant claims was a *bona fide* purchase in consideration of his indorsements. Defendant took possession of the goods. Plaintiffs demanded of him possession of the goods then in the stock, and which they had furnished to Chase and Totten. Defendant refused possession, and thereupon plaintiffs brought this suit in replevin, and recovered possession. The trial resulted in a verdict and judgment for plaintiffs.

The case was submitted to the jury upon two theories: 1. That plaintiffs had not parted with the title to the goods, that they were not sold to defendant in the due course of trade, and they were entitled to recover possession; 2. That

Chase and Totten made false and fraudulent representations to plaintiffs as to their financial standing, and that therefore plaintiffs might rescind the sale and recover the goods.

It is impossible to tell from the record upon which theory the verdict was rendered. It is very doubtful whether the representations alleged to have been made were in fact or in law fraudulent; but it is unnecessary to determine that question. All the evidence in regard to such representations or the financial condition of the firm was immaterial. Mr. Imhoff, who made the arrangement on behalf of plaintiffs, testified that he "did not rely upon these representations, but upon his contract; that it was immaterial to plaintiffs what their financial condition was; that the statement made by Chase to him that they could clean up three thousand to three thousand five hundred dollars did not deceive him, and that he did not rely upon it."

The court therefore erred in not striking out all evidence of these representations upon motion of the defendant's attorneys. That plaintiffs did not rely upon these alleged representations is evident from the further fact that when Mr. Imhoff demanded the goods of defendant, he only claimed them under the contract. It is therefore unnecessary to discuss separately any of the forty-three assignments of error.

It is, however, proper to note that the assignment of error upon the charge of the judge is too general. It is, that the judge erred in giving that portion of his charge to the jury commencing, "I give you these requests on the part of the plaintiffs," and ending with, "I give you these requests on the part of the defendant." This involved twelve requests of the plaintiffs, the most of which were correct propositions of law.

The sole issue for the jury was, whether or not the plaintiffs and Totten and Chase made a contract by which the title of the goods was to remain in the plaintiffs until they were paid for, or sold in the due course of trade. The defendant did not buy them in the due course of trade; and therefore, if such a contract was made, the plaintiffs were entitled to recover. Such a contract is valid under the repeated decisions of this court, and we are not concerned with the decisions of other courts upon the subject. Those who purchased in the usual course of trade would take a good title. Those who did not purchase in the usual course of trade could not rely upon the bare possession of their vendor as conclusive evidence of title.

The judgment must be reversed, and a new trial ordered.

SALES. — TITLE RETAINED IN THE VENDOR: See *Stephens* v. *Gifford*, 137 Pa. St. 219; 21 Am. St. Rep. 868, and note. That property may be deemed "sold," it is not necessary that title should have actually passed to the vendee: *Eaton* v. *Richeri*, 83 Cal. 185. Title does not pass in chattels sold upon condition that the price must be paid upon delivery, until the payment of such price: *Empire State etc. Co.* v. *Grant*, 114 N. Y. 40; and a tender of only a part of the price is not sufficient: *Jennings* v. *West*, 40 Kan. 372. The rule is a harsh one which allows the seller to retain title to personalty which he has apparently sold to one who is permitted to have the possession, control, and apparent ownership thereof, without notice being given to such persons as deal with the buyer: *Edwards* v. *Symons*, 65 Mich 348.

The vendee of personalty sold on condition that the vendor should retain title until the payment of the price may exchange it for other property before he pays the price; but such a barter does not affect the vendor's title to the property received from him, nor does it confer on him any rights in the property for which it was exchanged: *Deadman* v. *Earle*, 52 Ark. 165. A vendee in lawful possession of personalty, under a contract whereby the vendor is to retain title until a certain condition is performed, cannot be dispossessed by replevin: *Sewing Machine Co.* v. *Bothane*, 70 Mich. 443.

Under a contract for the sale of personalty, it being stipulated that the vendor should retain title till the property should be shipped to the vendee, it could not be seized to satisfy taxes assessed against the vendor prior to its shipment: *Hovey* v. *Gow*, 81 Mich. 314. Compare *Jenks* v. *Colwell*, 66 Mich. 420; 11 Am. St. Rep. 502, and note. A purchaser of chattels from one in possession under a conditional sale gets only the title of his vendor, even though he buys in ignorance of the condition and in good faith: *Sumner* v. *Woods*, 67 Ala. 139; 42 Am. Rep. 104, and note 105–107; *Begole* v. *Stone*, 72 Mich. 71.

MILLARD *v.* TRUAX.

[84 MICHIGAN, 517.]

ASSAULT — EVIDENCE — PROVOCATION — MITIGATION OF DAMAGES. — A defendant cannot give in evidence, in mitigation of damages for an assault, the acts and declarations of the plaintiff at a different time, or any antecedent facts which are not fairly to be considered as part of one and the same transaction. To entitle the defendant to give evidence of provocation in mitigation of damages, the provocation must be so recent and immediate as to induce a presumption that the violence done was committed under the immediate influence of the feelings and passions excited by it.

Watts and Smith, and Robert E. Frazer, for the appellant.

F. B. Wood, J. E. Bird, and Weaver and Bean, for the respondent.

LONG, J. This is an action of trespass for an assault and battery. Plaintiff had verdict and judgment for four hundred dollars. Defendant brings error.

The plaintiff is seventy-five years of age, and an attorney at law. He met the defendant in the hall of the court-house in Adrian, Lenawee County, where the parties reside. It appears that some litigation had been going on between them, and the plaintiff, on the morning of the claimed assault, accosted the defendant, and told him he had paid the money in on the decree. Plaintiff had filed a bill to redeem from a certain mortgage, and the decree granted him the right to redeem upon the payment of a certain amount, which he had paid to the register of the court in Ingham County. Upon being thus accosted, the defendant replied: "Yes, damn you; you have robbed me out of that farm, and damn you, I will be revenged." He thereupon struck the plaintiff with his fist, knocking him down, causing a severe contusion on the cheek, near the eye. This was the plaintiff's claim. On his cross-examination he was permitted to testify that before that time he had obtained a decree against the defendant for the possession of the farm; that he was compelled to go to the court, and take proceedings to enforce it; that he made complaint against defendant for contempt of court in not obeying the decree, and the court pronounced the defendant guilty, and committed him to jail.

The defendant was called as a witness, and testified that he was imprisoned for such contempt for some six months; that when he was first shut up, the sheriff gave him for a time the limits of the town. He was then asked by his counsel: —

"Q. Now, did or did not Mr. Millard come up there and order the sheriff to shut you up entirely? A. He made the order, the sheriff told me. I did not hear it, no more than the sheriff told me."

Plaintiff's counsel moved to strike this testimony out, and it was so ordered. The following question was then asked: —

"Q. Were you, shortly after that, shut up and kept confined? A. Yes, sir; it injured my health."

This was objected to as immaterial, and the objection sustained. This is claimed as error. There was no exception taken to these rulings, and for that reason they cannot now be considered; but even if there had been proper exceptions, the rulings were correct. Such testimony was wholly incompetent and immaterial, so far as the defense was concerned. It could not have been allowed even in mitigation of damages. Its admission would rather have tended to aggravate the dam-

ages. It was at a time long prior to the assault. The imprisonment itself, it appears, was by order of the court for contempt. If the defendant had been wronged by such imprisonment, he certainly had no right to revenge it upon the person of the plaintiff. A defendant cannot give in evidence in mitigation of damages for an assault the acts and declarations of the plaintiff at a different time, or any antecedent facts which are not fairly to be considered as part of one and the same transaction. To entitle the defendant to give evidence of provocation in mitigation of damages, the provocation must be so recent and immediate as to induce a presumption that the violence done was committed under the immediate influence of the feelings and passions excited by it: *Coxe* v. *Whitney*, 9 Mo. 531; *Lee* v. *Woolsey*, 19 Johns. 319; 10 Am. Dec. 230.

The only other error assigned relates to the charge of the court. It is conceded that the court correctly stated the rule to the jury upon the question of exemplary damages; but it is urged that, having stated what circumstances would authorize exemplary damages, he should also have stated in the same connection what circumstances would mitigate or reduce the exemplary damages. No instructions to the jury were asked by the defendant, and the attention of the court was in no way called by counsel to any fact or circumstance which would have mitigated the damages, and no fact or circumstance is pointed out here, and the record does not disclose any. It appears by the record to have been a cruel, wanton, and malicious assault, committed without any immediate provocation, for the purpose of revenge for some claimed previous wrong. It was committed upon an aged and infirm man, who had pleasantly accosted him that morning. We see no error in the case.

The judgment must be affirmed, with costs.

ASSAULT. — PROVOCATION, WHEN ADMISSIBLE IN EVIDENCE IN MITIGATION OF DAMAGES: See *Ward* v. *White*, 86 Va. 212; 19 Am. St. Rep. 833, and particularly note. Evidence that plaintiff used abusive and insulting language to defendant just previous to the assault for which damages are sought is admissible: *Kent* v. *Cole*, 84 Mich. 579; *Culley* v. *Walkers*, 80 Mich. 443; *Galbraith* v. *Fleming*, 60 Mich. 403.

WAYNE COUNTY SAVINGS BANK *v.* STOCKWELL.

[84 MICHIGAN, 586.]

HIGHWAYS BY USER. — A highway established by user need not be of the statutory width. A highway by user becomes such to the width and extent used.

HIGHWAYS BY USER — ABANDONMENT. — A highway established by user, or any portion of it, may be lost by non-user, but the non-user will not affect the portion kept in use.

Millard, Wood, and Bird, for the appellants.

Andrew Howell, for the respondent.

MORSE, J. The bill in this case was filed to restrain the defendants from closing up or in any manner obstructing an alleged public highway in the township of Medina, in Lenawee County, known as the Savage road, it being claimed that the said highway was duly laid out in 1840, four rods in width, commencing at a point on the east side of section 13 in said township, and running to the quarter-post standing on the west side of the section. It is not deemed necessary, for the purposes of this case, to give here the particular survey of the road made in 1840.

Between sections 13 and 14 there runs a highway, north and south. The defendant Stockwell owns land for eighty rods east of this highway upon the north side of the east and west quarter line of said section 13, and Frank A. Kinney for the same distance upon the south side. East of the lands of Kinney are the lands of the complainant, known as the old Savage farm. It is claimed in the bill that this highway, known as the Savage road, ran upon this east and west quarter line to the center of the section, near the west bank of a stream known both as Tiffin River and Bean Creek. It is alleged in the bill that this highway was opened on this quarter line as far as Bean Creek very soon after it was surveyed and established, but the part of the road east of said creek was never opened or worked, and no bridge was ever built across the creek. The bill further alleges that the road from the west section line of 13 through to said creek has ever since been opened, used, and traveled as a public highway, and for over forty years has been recognized as such by the public and the township authorities, and has been kept open to the width of from two and a half rods to three rods; that about fifteen years before the filing of this bill, this road and the lands adjacent to it were set off into a road district, and

called road district No. 42, and ever since then the lands have been assessed for highway labor upon said road, and a pathmaster elected each year until the one in which this bill was filed; that there has never been any other road or highway, public or private, giving ingress and egress to and from the said Savage farm, now owned by complainant, and that said Savage road is the only way out from and into this farm.

It very clearly appears from the testimony that this road was laid out by the highway commissioners of Medina, the survey being made March 26, 1840, and recorded April 2, 1841. Whether such establishment conformed in every respect to the statutes then existing is not material, in our view of the case. The testimony shows plainly that the road was opened and worked, as claimed by the bill, as far east as Bean Creek; that the then owners of the premises now occupied and owned by defendants, Stockwell and Kinney, when they cleared and worked their lands, built their fences so as to leave this road open to the width of from two and a half to three rods, the center of the same being the quarter line. From that time—a period of over forty years—this road has been universally recognized and treated by the public as a highway, most of them regarding it as a public way, and the others, as they testify, supposing it was a private way for the benefit of the Savage farm, it being called sometimes the Savage road and sometimes Savage lane. It formed by itself a road district, and work was done upon it. In 1884, the commissioner of highways undertook to discontinue it as a public highway, but the proceedings are not relied upon as being effectual lawfully to do so. There is no doubt in our minds that this road has become a highway by user, and that the fencing up and obstructing of it by the defendants in the spring of 1888 was unlawful, and rightfully enjoined by the court below.

The answer of the defendants relied almost entirely upon the claim that the road had never been fully opened, being, as shown by the testimony in their behalf, at different times fenced up, and otherwise obstructed at various places. The circuit judge found and decreed that a public highway existed two and a half rods in width, of which the east and west quarter line was the center, and that the same extended from the quarter-stake in the highway, running north and south between sections 13 and 14, along the said quarter line to the northwest corner of the lands owned by complainant, which would be one and a half rods off from the lands of each of

the defendants. The defendants were ordered to remove all obstructions placed by them in such highway, and also forever enjoined and restrained from hereafter obstructing, encroaching upon, or in any wise interfering with said highway so as to impede the full and free use of the same as a public highway.

It was shown that, when Savage lived upon his farm, at several different times he temporarily put fences across the road on his own premises to keep his cattle or stock from getting out, so that he could pasture or water them in the highway, and connected with some of his fields. There was at one time a temporary fence, with a pair of bars, at the extreme west end of the road, and between the lands now owned by the defendants; but there can be no serious contention that this road, in so far as it has been declared a highway by the decree of the court below, was ever abandoned or went into disuse, or that it was not understood by all to be a highway with which the land-owners could not interfere to prevent public travel upon it. It was recognized as a public highway in 1884, by the petition and other proceedings taken to discontinue it; and one of the defendants testifies that he did not meddle with it until 1888, because he supposed that it was a road, until he was advised about that time, by a lawyer, that it was not. A very similar case to the one before us is *Nye* v. *Clark*, 55 Mich. 602.

We do not think it necessary to discuss or state the evidence in detail. We are all satisfied that a road, — a public highway, — as found by the circuit judge, has long been established by user. It is not necessary that a highway established by user should be of the statutory width of four rods. A highway by user becomes such to the width and extent used: *County of Wayne* v. *Miller*, 31 Mich. 447, 449; *Lyle* v. *Lesia*, 64 Mich. 22; *Scheimer* v. *Price*, 65 Mich. 638; *Kruger* v. *Le Blanc*, 70 Mich. 76; *Pratt* v. *Lewis*, 39 Mich. 7, 12; *McKay* v. *Doty*, 63 Mich. 581.

There is no doubt that an attempt was made to lay out this highway four rods wide, and across the whole of the section. The fact that no part of the highway east of Bean Creek was ever used, or that a portion of it was shut up and abandoned west of the creek, or that the part of it running between the lands of Stockwell and Kinney was reduced to a width of two and a half rods, would not destroy the right of the public or the complainant to preserve the use of such portion as had

been for so long a time used as a public highway. A highway, or any portion of it, can be lost by non-user, but that will not affect the portion kept in use: *Gregory* v. *Knight*, 50 Mich. 61, 64; *Lyle* v. *Lesia*, 64 Mich. 22; *Coleman* v. *Flint etc. R. R. Co.*, 64 Mich. 163.

The decree of the court below is affirmed, with costs.

HIGHWAYS BY USER. — The public cannot acquire a prescriptive right to pass over a tract of land generally, but it must be confined to a certain, definite, and precise line or way: *Gentleman* v. *Soule*, 32 Ill. 271; 83 Am. Dec. 264. A highway by user includes only so much land as is used for that purpose: *Scheimer* v. *Price*, 65 Mich. 638. Highways by user are based upon the implied dedication by the owner, in which case the public is only entitled to claim the part which it has been permitted to use: *Kruger* v. *Le Blanc*, 70 Mich. 76; *McKay* v. *Doty*, 63 Mich. 581.

HIGHWAYS — DISCONTINUANCE BY NON-USER. — The reduction of the width of a street acquired by user operates as a discontinuance of so much of it as is thereby excluded: *Valentine* v. *Boston*, 22 Pick. 75; 33 Am. Dec. 711. A highway can be partially discontinued by non-user; and a highway by user only is measured, as to its width, by such use: *Coleman* v. *Flint etc. R. R. Co.*, 64 Mich. 160; *Wheeler* v. *City of Fitchburg*, 150 Mass. 350.

KINGMAN & Co. *v.* DENISON.

[34 MICHIGAN, 606.]

SALES. — RIGHT OF STOPPAGE IN TRANSIT is a right possessed by the seller to reassume the possession of goods not paid for, while on their way to the purchaser, in case he becomes insolvent before he has acquired actual possession of them.

SALES. — RIGHT OF STOPPAGE IN TRANSIT is properly exercised only upon goods which are in passage, and are in the hands of some intermediate person between the seller and purchaser in process and for the purpose of delivery; and the right may be exercised, whether the insolvency of the purchaser exists at the time of sale, or occurs at any time before actual delivery of the goods without the knowledge of the seller.

SALES. — RIGHT OF STOPPAGE IN TRANSIT will not be defeated by an apparent sale, fraudulently made, without consideration, for the purpose of defeating the right; for there must be a purchase for value without fraud, to have this effect.

CHATTEL MORTGAGE — LIEN ON AFTER-ACQUIRED PROPERTY — STOPPAGE IN TRANSIT. — A chattel mortgage covering additions to and substitutes for the mortgaged property will not constitute a lien on goods ordered by the mortgagor before the execution of the mortgage, and which were never actually delivered to him as owner, nor will the seller's right of stoppage in transit, in case of the insolvency of the mortgagor, be divested by a purchase of the goods so ordered, by the mortgagee at the mortgage sale.

Taggart and Denison, for the appellant.

Sweet and Perkins, for the respondents.

LONG, J. On July 8, 1889, defendant Denison wrote the plaintiff at Peoria, Illinois, ordering five thousand pounds of twine. No dealings had ever been had between the parties prior to that time. The plaintiff received the letter the next day, and at once wrote Denison: "We have entered your order, and twine will go forward to-morrow." On July 11th the twine was shipped to W. C. Denison, Grand Rapids, Michigan, plaintiff taking shipping bill from the railroad company there, and on same day sending it to Denison, with statement of account for value of the twine. The twine was received at Grand Rapids by the Grand Rapids and Indiana Railroad Company, July 17th, and on the 18th it turned it over to a teamster, who delivered it at the store which was occupied by Denison at the time the order was made.

It appears that on July 9th the Grand Rapids Savings Bank caused an attachment to be levied upon Denison's property. On that evening Denison gave the bank a chattel mortgage on all the goods in the store and at a warehouse there, and a store situate at another place outside of Grand Rapids. July 10th, 11th, and 12th he gave mortgages on the same property to several other creditors, two of them being given to the defendant the McCormick Harvesting Machine Company. The goods mortgaged were held in the store by the agents of the bank until they were sold under one of the mortgages, which was about July 18th, at which time the defendant the McCormick Harvesting Machine Company bid the goods in, and continued to occupy the store, putting Mr. Denison in as its agent. The McCormick Harvesting Machine Company mortgage contained a clause, after a description of the property mortgaged, as follows: "And all additions to and substitutes for any or all of the above-described property."

On September 7th, plaintiff, who had no notice or knowledge of the changed condition of Mr. Denison's affairs, drew on him at sight for the amount of the bill. This draft was not paid, and on September 14th plaintiff wrote him for prompt remittance, which was not made. On September 19, 1889, plaintiff brought replevin against the defendants for the twine, finding about one half of it, the balance having been sold out of the store by the McCormick Harvesting Machine Company. On the trial of the cause the defendants waived return of the property, and had verdict and judgment against

the plaintiff for $351.91, the value of the twine taken, and costs. Plaintiff brings error.

The plaintiff asked the court to instruct the jury that plaintiff was entitled to a verdict; and, in the ninth request, asked an instruction that "if Mr. Denison did not in fact receive the twine at his store, but was not there when it was delivered, and never received and accepted it for his use in any way, except that, finding it in the store, he allowed the mortgagees to assume control of it, plaintiffs could retake it as against him."

And in the fourteenth request it was asked that the jury be instructed that "the McCormick company, as mortgagee, is in no better position than Mr. Denison. Its mortgage does not cover this twine, nor is it a *bona fide* purchaser."

Several requests were also asked for instructions to the jury relating to the insolvency of Mr. Denison at the time of the purchase, and his intent not to pay for the twine at the time of its purchase, or at the time when it was received at the store, on July 18th. These last-named requests we do not deem it necessary to set out here for an understanding of the points involved. The requests set out were refused by the trial court, and upon such ruling the plaintiff assigns error.

The court, in its charge to the jury, stated: "Plaintiff claims the right to the possession of these goods at the time this suit was commenced,—1. Because, as counsel claims, the goods were ordered, were purchased by Mr. Denison at a time when he was insolvent, and knew that he was insolvent, and had no intention, or at least no reasonable expectation, of paying for them according to the terms of the contract; and the plaintiff's counsel also claims the right of stoppage in transit. All I need to say in regard to the latter claim is, that I think the right of stoppage in transit, under the facts of this case as shown by the evidence, has no application whatever; there is no such right existing."

This part of the charge relating to the right of stoppage in transit is assigned as error.

The court was in error in refusing these requests to charge, and in the charge as given. It is not seriously contended here but that, under the evidence given on the trial, the defendant Denison was insolvent at the time the goods were ordered. At least this was a question of fact which should have been submitted to the jury; and if so found, the question of the right of stoppage in transit was an important question in the case.

The right of stoppage in transit is a right possessed by the seller to reassume the possession of goods not paid for, while on their way to the vendee, in case the vendee becomes insolvent before he has acquired actual possession of them. It is a privilege allowed to the seller for the particular purpose of protecting him from the insolvency of the consignee. The right is one highly favored in the law, being based upon the plain reason of justice and equity that one man's property should not be applied to the payment of another man's debts: *Gibson* v. *Carruthers*, 8 Mees. & W. 337. But it is properly exercised only upon goods which are in passage, and are in the hands of some intermediate person between the vendor and vendee in process and for the purpose of delivery; and this right may be exercised, whether the insolvency exists at the time of the sale, or occurs at any time before actual delivery of the goods without the knowledge of the consignor: *O'Brien* v. *Norris*, 16 Md. 122; 77 Am. Dec. 284; *Reynolds* v. *Boston & M. R. R. Co.*, 43 N. H. 580; *Blum* v. *Marks*, 21 La. Ann. 268; 99 Am. Dec. 725; *Benedict* v. *Schaettle*, 12 Ohio St. 515. This right of stoppage in transit will not be defeated by an apparent sale, fraudulently made, without consideration, for the purpose of defeating the right. There must be a purchase for value, without fraud, to have this effect: *Harris* v. *Pratt*, 17 N. Y. 249.

In the present case it appears that the goods arrived in Grand Rapids July 17th, and were taken to the store on the 18th. Mr. Denison was not in the store at the time they were taken in. Mr. Talford was in possession of all the goods and of the store at this time for all the mortgagees, and after the sale under the mortgage the McCormick company took possession, and was in possession at the time this replevin suit was commenced. The testimony tends to show that at the time demand was made upon the McCormick company and Mr. Denison for the twine, Mr. Denison stated that he thought the plaintiff, having heard of his financial affairs, would not ship the twine, and that he did not know it had been shipped until it was in the store; and he was very sorry it had come, under the circumstances. The McCormick company claimed that by the terms of its mortgage it was entitled to hold the twine.

The court was in error in not submitting to the jury the question whether the goods had come actually to the possession of Mr. Denison. The circumstances tend strongly to

show that he never had actual possession of them, and never claimed them as owner. He had made the order, and was notified that they would be shipped; but from that time forward it is evident that he made no claim to them. The McCormick company claimed that they passed to it under the terms of its mortgage. It, however, stood in no better position then Denison. If the goods never actually came into the possession of Denison as owner, the mortgage lien would not attach, even under the clause in the mortgage covering after-acquired property. It does not stand in the position of a *bona fide* purchaser of the property. The right of stoppage could not be divested by a purchase of the goods under the mortgage sale. The transit had not ended unless there was actual delivery to Mr. Denison.

These were questions of fact for the jury, which the court refused to submit. If the jury had found that Denison was insolvent at the time the order was made, or became insolvent at any time before the claimed delivery of the goods, and that the goods were never actually delivered to the possession of Mr. Denison, then the vendor's rights would have been paramount to any right which the McCormick company could have acquired at the mortgage sale: *Underhill* v. *Muskegon Booming Co.*, 40 Mich. 660; *Lentz* v. *Flint etc. R'y Co.*, 53 Mich. 444; *White* v. *Mitchell*, 38 Mich. 390; *James* v. *Griffin*, 2 Mees. & W. 623.

In the view we have taken of the case, we think the other questions raised are unimportant, and we will not pass upon them.

The judgment of the court below must be reversed, with costs, and a new trial ordered.

SALES. — STOPPAGE IN TRANSITU, RIGHT OF, WHO MAY EXERCISE, AND UPON WHAT GROUNDS: See note to *Hause* v. *Judson*, 29 Am. Dec. 384–394; *Jones* v. *Marl*, 37 Cal. 639; 99 Am. Dec. 338, and note; *Farrell* v. *Richmond etc. R. R. Co.*, 102 N. C. 390; 11 Am. St. Rep. 760, and note.

CHATTEL MORTGAGE — AFTER-ACQUIRED PROPERTY. — The general rule is, that subsequently acquired goods, although acquired in substitution, or by way of renewal of goods on hand at the execution of the mortgage, are not included in the lien of the mortgage: Note to *Moody* v. *Wright*, 46 Am. Dec. 715, 716; note to *Gregg* v. *Sanford*, 76 Am. Dec. 727–732.

CASES

IN THE

SUPREME COURT

OF

MINNESOTA.

FAKE *v.* ADDICKS.

[45 MINNESOTA, 37.]

ANIMALS — VICIOUS DOG — REPUTATION AS EVIDENCE OF NOTICE. — Where one keeps upon his premises a dog which has attacked or bitten a considerable number of persons and is notoriously cross and vicious, it may be presumed that the owner has some knowledge of this fact, and in an action to recover for injuries inflicted by such dog, evidence of his general repute for viciousness is admissible, not to prove the particular fact of the dangerous propensity of the animal, but the public notoriety, and as tending to support the inference of knowledge of such propensity on the part of his owner.

ANIMALS — VICIOUS DOG — NOTICE OF VICIOUSNESS. — In an action to recover for an injury received from a vicious dog, the *gravamen* of the action is the neglect of the owner of the animal, known by him to be vicious and liable to attack and injure people, to restrain him so as to prevent the risk of damage, and the notice of such propensity must be such as to put a prudent man on his guard.

ANIMALS — VICIOUS DOG — PROVOCATION BY STEPPING UPON HIM. — Where a person, with full knowledge of the evil propensities and viciousness of a dog, wantonly excites him or voluntarily and unnecessarily puts himself in his way, he cannot recover for an injury; but the fact that the party injured accidentally backed or stepped upon the dog without knowing of his presence is no defense for the owner of the dog.

Eaton and Cutting, for the appellant.

William E. Culkin and J. T. Alley, for the respondent.

VANDERBURGH, J. The plaintiff was bitten and injured by a dog alleged to be dangerous and accustomed to bite mankind, and kept and owned by defendant with knowledge of his vicious propensities. There was sufficient evidence to prove his vicious disposition, and that it was not safe to permit him to be at large. The testimony in plaintiff's behalf

was sufficient to show that the dog had attacked and bitten, or attempted to bite, several persons before the injury complained of. There was also evidence enough to support the verdict that the defendant had notice sufficient to warn him of his duty to kill or confine the animal. The plaintiff's brother testifies that in 1887, before the mischief complained of, he was bitten by the dog while passing through defendant's yard, and that defendant saw it. Defendant had owned and kept this dog between two and three years. One of his own witnesses states that he "was cross, ugly, and vicious"; and there is evidence tending to show that he had, on several occasions, attacked persons in defendant's yard, or going past his house, to the knowledge of members of the family. Upon the question of *scienter*, evidence was also admitted of the general repute in the neighborhood of the vicious nature of the dog. If one keeps upon his premises a dog which has attacked or bitten a considerable number of persons coming upon or passing by them, and is notoriously cross and vicious, it may safely be assumed that the owner has some knowledge of the fact. The evidence of general repute is in such cases received, not to prove the particular fact of the dangerous propensity of the animal, but the public notoriety, and as tending to support the inference of knowledge, on the part of the owner, of such propensity; and for such purpose it was received in this instance, in connection with other evidence on the subject. The court was sufficiently guarded in its instructions to the jury on this branch of the case, and we think there was no error in permitting it to go to the jury: *Jones* v. *Perry*, 2 Esp. 482; 1 Greenl. Ev., sec. 101; *Meier* v. *Shrunk*, 79 Iowa, 17; *Murray* v. *Young*, 12 Bush, 337; *Keenan* v. *Hayden*, 39 Wis. 558.

The *gravamen* of the action is the neglect of the owner of an animal, known by him to be vicious and liable to attack and injure people, to restrain him so as to prevent the risk of damage; and the notice of such propensity must be such as to put a prudent man on his guard.

At the time of the injury complained of, the plaintiff and defendant, who had his dog with him, were present on the premises of a neighbor who was engaged in thrashing his grain. In the afternoon the plaintiff got into a scuffle with a third party, and while this was going on, the dog suddenly attacked him, biting and lacerating his leg severely. Plaintiff's testimony shows that the dog came up from behind and

seized his leg without warning, and he denies that he provoked or stepped on him. One of defendant's witnesses testifies that he "heard the growl of the dog," and he looked around, and saw that he had "grabbed" the plaintiff. The conduct of the dog and the severity of the injury show his malignant disposition. But another witness for the defendant swears that, while the parties were scuffling, the plaintiff "backed on the dog. The dog was lying down. He got up and bit him." There is no evidence in the case that the plaintiff knew the dog was lying there, or that, if he did tread on him (which was a question for the jury), the act was other than accidental.

The defendant assigns as error the charge of the court on this subject, in which it is stated that it was immaterial in this case whether the plaintiff stepped on the dog or not. And so, under the evidence, we think it was. No case holds a contrary doctrine. It is true that in another part of the charge the court is less guarded, and states that the owner who "knowingly keeps a vicious dog is responsible for all the injuries he may do in that direction, whether he is provoked or not," but it is clear the court had in mind and referred to the facts as they appeared in this case. The charge was not, therefore, prejudicial, and besides, the defendant's exception does not cover that portion of the charge, but only that part first referred to. In *Smith* v. *Pelah*, 2 Strange, 1264, the chief justice ruled "that if a dog has once bit a man, and the owner, having notice thereof, keeps the dog, and lets him go about or lie at his door, an action will lie against him at the suit of the person who is bit, though it happened by such person's treading on the dog's toes; for it was owing to his not hanging the dog on the first notice, and the safety of the king's subjects ought not afterwards to be endangered": Wood on Nuisances, sec. 766; *Muller* v. *McKesson*, 73 N. Y. 195, 201; 29 Am. Rep. 123. The cases cited by the defendant are to the point that where a person voluntarily and unnecessarily provokes a vicious animal, and thus invites or induces the injury, knowing the probable consequences, he is not entitled to recover: *Lynch* v. *McNally*, 73 N. Y. 347. Here there is no evidence that the plaintiff knew the dog was in his way. The case is not within the rule last referred to. The evidence is conflicting on the question whether plaintiff stepped on the dog at all; but conceding it to be true, that portion of the charge excepted to was correct. Says Church, C. J., in *Muller* v. *McKesson*, 73 N. Y.

195, 201, 29 Am. Rep. 123: "If a person, with full knowledge of the evil propensities of an animal, wantonly excites him or voluntarily and unnecessarily puts himself in the way of such an animal, he would be adjudged to have brought the injury upon himself, and ought not to be entitled to recover. In such a case it cannot be said, in a legal sense, that the keeping of the animal, which is the *gravamen* of the offense, produced the injury; but as the owner is held to a rigorous rule of liability on account of the danger to human life and limb by harboring and keeping such animals, it follows that he ought not to be relieved from it by slight negligence or want of ordinary care. To enable an owner of such an animal to interpose this defense, acts should be proved with notice of the character of the animal, which would establish that the person injured voluntarily brought the calamity upon himself." Plaintiff's inadvertence in "backing upon" or "treading upon" the dog was not such a case.

There are no other of the alleged errors which seem to require particular consideration.

Order affirmed.

VICIOUS ANIMALS — DOGS — NOTICE TO OWNER. — The owner of a vicious domestic animal, when chargeable with notice of its viciousness: *Knowles* v. *Mulder*, 74 Mich. 202; 16 Am. St. Rep. 627, and extended note. The owner of a vicious dog is answerable for any damage that he does: *McGuire* v. *Ringrose*, 41 La. Ann. 1029; *Dockerty* v. *Hutson*, 125 Ind. 102; *Clanin* v. *Fagan*, 124 Ind. 304; *Newton* v. *Gordon*, 72 Mich. 642. A party injured by a vicious horse may recover damages of the owner: *Reynolds* v. *Hussey*, 64 N. H. 64. The owner of a vicious bull, who allows it run at large, will be liable for any damage inflicted by it: *Klenberg* v. *Russell*, 125 Ind. 532; *Meier* v. *Shrunk*, 79 Iowa, 17.

MARSTON *v.* WILLIAMS.

[45 MINNESOTA, 116.]

MORTGAGE BY ABSOLUTE DEED AND DEFEASANCE — EFFECT OF RECORD OF DEED ALONE — JUDGMENT LIEN AS AGAINST PURCHASER FROM MORTGAGEE WITH NOTICE. — The record of a deed absolute in form, intended as a mortgage, will protect the rights of the grantee, although he has failed to record a defeasance, in the form of a contract to reconvey, which he has executed to the grantor; but a judgment properly docketed against the grantor is a lien upon his equity of redemption, as against a subsequent purchaser from the grantee with knowledge of the facts.

Lorin Cray, for the appellant.

Thomas Hughes, for the respondents.

COLLINS, J. On November 5, 1880, defendant Williams, then in actual possession of two hundred acres of land under a contract for its purchase, made with a railway corporation, and being unable to pay for the same, borrowed of defendant Thomas O. Jones the sum of fifteen hundred dollars for the purpose of making full payment and securing a deed of the land. On that day, using the fifteen hundred dollars and one hundred dollars of his own money, he paid for the land, and thereupon, by deed dated October 29, 1880, the railway corporation duly conveyed the same to Williams. On the first day named, Williams and his wife, for the purpose of securing the payment of the borrowed money, executed and delivered to defendant Thomas O. Jones a deed of warranty of 199 acres of the land so purchased from the corporation, one acre thereof having been previously sold to another party. These deeds were duly recorded on the eighth day of November, 1880. At the time of the execution and delivery of the deed last mentioned, Jones, the grantee therein, with his wife, made, executed, and delivered to Williams, one of the grantors, a land contract in the usual form, agreeing to sell and convey to Williams, his heirs and assigns, the land in question, upon being paid the sum of fifteen hundred dollars and interest at the time and in the manner therein prescribed. This contract was never recorded. Williams continued in actual occupancy of the premises, and with his family resided on the same until March 1, 1884. He claimed one eighty-acre tract as his homestead, and the court below found that it was his homestead up to the time that he removed, under the circumstances hereinafter stated. On March 1, 1884, defendant Williams, by a writing made upon the back of said land contract, duly witnessed and acknowledged, surrendered, assigned, and set over unto defendant Robert D. Jones all his right, title, and interest in the contract, under an agreement made between himself, said Robert D. Jones, and Thomas O. Jones, that the latter should sell and convey the land therein described to said Robert D. Jones for the sum of two thousand six hundred dollars, of which sum six hundred dollars should be paid to Williams, and the balance—which was the amount then due upon the land contract—should be paid to Thomas O. Jones. Thereupon the latter conveyed the premises to Robert D. Jones. As agreed upon, six hundred dollars of the amount to be paid for the land was paid to Williams, and on March 1, 1884, he removed from the same, surrendering possession to

the purchaser. In the year 1883, three separate money judgments had been obtained against Williams, and duly docketed in the office of the clerk of the district court for the county in which this land was situate, aggregating in amount the sum of $444.27. In two of these, plaintiff and one Perry were the judgment creditors. The plaintiff has, by proper assignment, succeeded to Perry's interest in these judgments, and he was the sole creditor named in the third judgment. No part of the judgments has been paid, except $236 on March 27, 1884. Executions were duly issued and placed in the hands of the proper officer, where they remained wholly unsatisfied when this action was commenced. The trial court found, in addition to the facts above stated, that none of these instruments executed and delivered by the defendants above named were made or procured with fraudulent design. It also found that the purchaser knew, at the time of the sale and conveyance to him on March 1, 1884, that Williams had obtained the sum of fifteen hundred dollars from Thomas O. Jones in 1880 for the purpose and that it was used in paying the railway company for the land, and that thereupon the conveyance, absolute in form, from Williams and wife to said Jones, and the land contract signed by the latter, were executed and delivered. On the findings it was adjudged, as matters of law, by the court below, that the deed from Williams and wife to Thomas O. Jones, and the contract from the latter to Williams, constituted a mortgage upon the land, and that upon a surrender of the contract by Williams, and the conveyance to Robert D. Jones, the absolute title to the land vested in the latter. Judgment was entered on these findings and order in favor of defendants, and from this judgment plaintiff appeals.

The appellant concedes that the transaction of November 5, 1880, in which Williams and his wife gave their warranty deed of the premises to Jones, and the latter executed and delivered to Williams his contract to reconvey, upon being paid the exact sum loaned by him, with interest, constituted a mortgage. But his counsel argues that as this mortgage was in two parts, one the unconditional deed, the other the defeasance, the recording of the deed alone was abortive, and of no avail as against subsequent good-faith purchasers or encumbrancers, or as against creditors with judgments duly docketed, without actual notice of the unrecorded defeasance; that as the record of the deed was but the record of a part of the mortgage, it gave no notice to any one; that such record failed

COLLINS, J. On November 5, 1880, defendant Williams, then in actual possession of two hundred acres of land under a contract for its purchase, made with a railway corporation, and being unable to pay for the same, borrowed of defendant Thomas O. Jones the sum of fifteen hundred dollars for the purpose of making full payment and securing a deed of the land. On that day, using the fifteen hundred dollars and one hundred dollars of his own money, he paid for the land, and thereupon, by deed dated October 29, 1880, the railway corporation duly conveyed the same to Williams. On the first day named, Williams and his wife, for the purpose of securing the payment of the borrowed money, executed and delivered to defendant Thomas O. Jones a deed of warranty of 199 acres of the land so purchased from the corporation, one acre thereof having been previously sold to another party. These deeds were duly recorded on the eighth day of November, 1880. At the time of the execution and delivery of the deed last mentioned, Jones, the grantee therein, with his wife, made, executed, and delivered to Williams, one of the grantors, a land contract in the usual form, agreeing to sell and convey to Williams, his heirs and assigns, the land in question, upon being paid the sum of fifteen hundred dollars and interest at the time and in the manner therein prescribed. This contract was never recorded. Williams continued in actual occupancy of the premises, and with his family resided on the same until March 1, 1884. He claimed one eighty-acre tract as his homestead, and the court below found that it was his homestead up to the time that he removed, under the circumstances hereinafter stated. On March 1, 1884, defendant Williams, by a writing made upon the back of said land contract, duly witnessed and acknowledged, surrendered, assigned, and set over unto defendant Robert D. Jones all his right, title, and interest in the contract, under an agreement made between himself, said Robert D. Jones, and Thomas O. Jones, that the latter should sell and convey the land therein described to said Robert D. Jones for the sum of two thousand six hundred dollars, of which sum six hundred dollars should be paid to Williams, and the balance—which was the amount then due upon the land contract—should be paid to Thomas O. Jones. Thereupon the latter conveyed the premises to Robert D. Jones. As agreed upon, six hundred dollars of the amount to be paid for the land was paid to Williams, and on March 1, 1884, he removed from the same, surrendering possession to

the purchaser. In the year 1883, three separate money judgments had been obtained against Williams, and duly docketed in the office of the clerk of the district court for the county in which this land was situate, aggregating in amount the sum of $444.27. In two of these, plaintiff and one Perry were the judgment creditors. The plaintiff has, by proper assignment, succeeded to Perry's interest in these judgments, and he was the sole creditor named in the third judgment. No part of the judgments has been paid, except $236 on March 27, 1884. Executions were duly issued and placed in the hands of the proper officer, where they remained wholly unsatisfied when this action was commenced. The trial court found, in addition to the facts above stated, that none of these instruments executed and delivered by the defendants above named were made or procured with fraudulent design. It also found that the purchaser knew, at the time of the sale and conveyance to him on March 1, 1884, that Williams had obtained the sum of fifteen hundred dollars from Thomas O. Jones in 1880 for the purpose and that it was used in paying the railway company for the land, and that thereupon the conveyance, absolute in form, from Williams and wife to said Jones, and the land contract signed by the latter, were executed and delivered. On the findings it was adjudged, as matters of law, by the court below, that the deed from Williams and wife to Thomas O. Jones, and the contract from the latter to Williams, constituted a mortgage upon the land, and that upon a surrender of the contract by Williams, and the conveyance to Robert D. Jones, the absolute title to the land vested in the latter. Judgment was entered on these findings and order in favor of defendants, and from this judgment plaintiff appeals.

The appellant concedes that the transaction of November 5, 1880, in which Williams and his wife gave their warranty deed of the premises to Jones, and the latter executed and delivered to Williams his contract to reconvey, upon being paid the exact sum loaned by him, with interest, constituted a mortgage. But his counsel argues that as this mortgage was in two parts, one the unconditional deed, the other the defeasance, the recording of the deed alone was abortive, and of no avail as against subsequent good-faith purchasers or encumbrancers, or as against creditors with judgments duly docketed, without actual notice of the unrecorded defeasance; that as the record of the deed was but the record of a part of the mortgage, it gave no notice to any one; that such record failed

to protect the mortgagee; and that appellant's judgments were liens prior and superior to the rights of Thomas O. Jones, or the rights and title of his grantee, Robert D. Jones. Relying on these propositions, it was plaintiff's object in this action to have his judgments declared prior liens, and superior to the rights and title of either of said parties to the land. To sustain this position, appellant's counsel has cited cases from several of the New York and Pennsylvania reports, among others, *Dey* v. *Dunham*, 2 Johns. Ch. 182, and *Jaques* v. *Weeks*, 7 Watts, 261. To the same effect, *Fisher* v. *Tunnard*, 25 La. Ann. 179, *Gulley* v. *Macy*, 84 N. C. 434, and *Ives* v. *Stone*, 51 Conn. 446, may be noticed. In Louisiana, New York, and Pennsylvania, the conclusions reached were placed upon express statutory provisions, unlike our own, in regard to the registration of mortgages; the statute of New York, the purport of which is stated in *Benton* v. *Nicoll*, 24 Minn. 221, being an example. But in the Connecticut and North Carolina cases, *supra*, it is distinctly asserted that such a decision is demanded by a proper interpretation of the registry laws in their general intent and purpose, as designed to afford a protection against fraud. But the current of authority, in the absence of an express statute requiring, without qualification, the record of the defeasance, is, that the rights of the mortgagee are fully protected by the recording of the deed, and without a record of the instrument by which the deed may be defeated. It is said that the record of a conveyance absolute in terms, being notice of a greater interest than the mortgagee really has, must be held adequate to protect his rights, and be treated as sufficient notice of his actual interest, whatever that may prove to be: *Bank of Mobile* v. *Tishomingo Sav. Inst.*, 62 Miss. 250; *Christie* v. *Hale*, 46 Ill. 117; *Kemper* v. *Campbell*, 44 Ohio St. 210; *Knowlton* v. *Walker*, 13 Wis. 264; Webb on Record of Title, secs. 137–139; 1 Jones on Mortgages, sec. 548.

It was held in *Benton* v. *Nicoll*, 24 Minn. 221, that a deed absolute in form, but a mortgage in fact, was properly recorded in a book kept for the recording of deeds, and that its defeasance — a bond in that instance — was rightfully recorded in the book kept for miscellaneous records. And further, that Revised Statutes of 1851, chapter 46, section 27, now section 23, chapter 40, General Statutes of 1878, repelled the inference that the statute in reference to the recording of deeds, mortgages, and other instruments contemplated the record of such a conveyance or deed in a book kept for the record of

mortgages. The deed record being therefore the proper place for the recording of the conveyance from Williams and wife to Thomas O. Jones, — although it was a mortgage, — its record was notice to plaintiff of all rights which Jones could claim under it, without reference to the defeasance. Again, had the latter instrument properly appeared of record in its place among the miscellaneous records, the true condition of affairs would not have been disclosed. Such a record — the deed in the record-book of deeds, the contract in the book of miscellaneous records — would not appear to be the record of a mortgage. *Prima facie*, the record of the two instruments would be that of a conditional sale (*Buse* v. *Page*, 32 Minn. 111), but *prima facie* only; for the real character of the transaction might otherwise be obvious, and undoubtedly its real character could be made to appear should occasion require: *Phœnix* v. *Gardner*, 13 Minn. 396 (430); *Butman* v. *James*, 34 Minn. 547; *Wakefield* v. *Day*, 41 Minn. 344. The interest of Thomas O. Jones as a mortgagee was fully protected by a record of the absolute conveyance to him; and it may be added, in this connection, that there was no merger of his mortgage when the land was sold and conveyed to the defendant Robert D. Jones: *Flanigan* v. *Sable*, 44 Minn. 417. The fact must be apparent that the plaintiff's judgments were liens upon the debtor's equity of redemption in the land, except as to the eighty acres which he occupied and held as a homestead. The record in the office of the register of deeds showed Thomas O. Jones to be the owner in fee of the land. Taking this record in connection with the unrecorded defeasance, and *prima facie* the transaction was a conditional sale to the judgment debtor, Williams. As a matter of fact, susceptible of proof, the debtor was a mortgagor holding an equity of redemption in the premises. There could be no method adopted by the mortgagor, the mortgagee, or the purchaser — the latter, as found by the court, having knowledge of the facts — by which the plaintiff could be deprived of his liens. As the record showed the title to the land to have gone absolutely from Williams, the debtor, to Jones, the mortgagee, years before the judgments were docketed, and thereafter to have passed directly to Jones, the purchaser, wholly failing to disclose the mortgagor's real interest when the judgments were docketed against him or at any subsequent time, the plaintiff was entitled, on the facts found, to a conclusion of law declaring these judgments to have been liens upon all of

the land except the homestead, subject and secondary to the mortgage interest held by Thomas O. Jones.

The case is remanded, with instructions to amend the judgment in accordance with these views.

DEED AND DEFEASANCE — MORTGAGE — RECORD OF DEED. — A deed with an unrecorded bond to reconvey, as between the parties, constitutes a mortgage only; but as to third parties without notice, it conveys the fee: *Knight* v. *Dyer*, 57 Me. 174; 99 Am. Dec. 765. A deed accompanied by a separate defeasance is merely a mortgage; yet it must be recorded as such, in order to give notice of its real effect to subsequent *bona fide* purchasers: *Manufacturers' etc. Bank* v. *Bank of Pennsylvania*, 7 Watts & S. 335; 42 Am. Dec. 240, and particularly note. A deed absolute, accompanied by a defeasance, will, if the defeasance is not recorded, though the deed is recorded, be treated as an unrecorded mortgage and postponed to the lien of a subsequent judgment: *Friedley* v. *Hamilton*, 17 Serg. & R. 70; 17 Am. Dec. 638, and note. In *Steen* v. *Mark*, 32 S. C. 286, where S. conveyed, by absolute deed to secure a debt, lands to M., which M. subsequently conveyed to A., who had notice of all the facts, S. was allowed to maintain an action to redeem against M. and A. upon payment of the debt.

NOTICE — OUTSTANDING EQUITIES. — One who takes a deed of land with knowledge of an outstanding equitable right or title in a third person, takes it subject to such outstanding right: *McCone* v. *Courser*, 64 N. H. 506.

GILBERT *v.* HOW.

[45 MINNESOTA, 121.]

POWERS OF ATTORNEY RECEIVE A STRICT INTERPRETATION, and the authority given by them is never extended by intendment or construction beyond that which is given in terms, or absolutely necessary to carry the authority into effect.

JOINT POWER OF ATTORNEY GIVEN BY TWO PERSONS, authorizing another to enter upon, take possession of, and convey all lands in which they may be interested, does not authorize the donee of the power to convey lands in which one only of the donors is interested, and a conveyance made in the name of both is void, unless both had an interest in the lands conveyed.

EJECTMENT. The plaintiff claimed title under Mary A. Clarke, a former owner of the property, under a conveyance purporting to be made by Mary A. Clarke and Benjamin F. Bucklin, by Franklin Chase, their attorney in fact. The question was, whether this conveyance transferred her title. Judgment for the defendant. Plaintiff appealed.

H. J. Peck, for the appellant.

Southworth and Coller, for the respondent.

COLLINS, J. The deed in which Mary A. Clarke and B. F. Bucklin were named as grantors, and George A. Bucklin as grantee, was executed by Bucklin in person, and by Franklin Chase in behalf and as the attorney in fact of Mary A. Clarke. The land described therein was then the sole property of the grantor last mentioned, so far as was shown by the record, Bucklin having no interest in it. The power of attorney, by virtue of which Chase assumed to act, was a joint power, executed and delivered to him by Mary A. Clarke and B. F. Bucklin. By its terms, the latter constituted and appointed Chase "our true and lawful attorney for us, and in our names," to enter upon and take possession of all lands "to which we are or may be in any way entitled or interested, and to grant, bargain, and sell the same, ... and for us and in our names to make and deliver good and sufficient deeds; and we do hereby further constitute the said Chase our attorney, and in our names to transact and manage all business; and also in our names to demand, sue for, recover, and receive all sums of money," etc.

All powers of attorney receive a strict interpretation, and the authority is never extended by intendment or construction beyond that which is given in terms, or is absolutely necessary for carrying the authority into effect, and that authority must be strictly pursued: *Rossiter* v. *Rossiter*, 8 Wend. 494; 24 Am. Dec. 62; *Brantley* v. *Southern Life Ins. Co.*, 53 Ala. 554; *Bliss* v. *Clark*, 16 Gray, 60. This rule was applied in *Rice* v. *Tavernier*, 8 Minn. 214 (248); 83 Am. Dec. 778; *Greve* v. *Coffin*, 14 Minn. 263 (345); 100 Am. Dec. 229; *Berkey* v. *Judd*, 22 Minn. 287. And a party dealing with an agent is chargeable with notice of the contents of the power under which he acts, and must interpret it at his own peril: *Sandford* v. *Handy*, 23 Wend. 260; *Nixon* v. *Hyserott*, 5 Johns. 58.

The power under which Chase pretended to convey a tract of land, the sole property of Mary A. Clarke, must be construed as authorizing him to convey such lands only as were held and owned by his two constituents jointly or in common, and not the lands held and owned by either and separately. By its terms, the attorney was not empowered to convey land held and owned as the undivided property of one, and in which the other had no interest, nor was he given authority to transact any business, except that in which the parties were jointly concerned. The authority was special, and the written power joint in form. No mention was made of the separate

property or business of either of the parties who executed it, and it cannot be inferred that they intended to confer upon Chase the power to convey such property or to transact such business: *Dodge* v. *Hopkins*, 14 Wis. 630; *Johnston* v. *Wright*, 6 Cal. 373. This rule is also recognized in *Holladay* v. *Daily*, 19 Wall. 606, although the point was not directly in issue. The deed referred to was a nullity, did not convey the land to George A. Bucklin, and when the mortgage given by Mary A. Clarke was foreclosed by action brought against Bucklin alone, the proper party, the owner of the land, was not made a defendant. The foreclosure sale was void, and a purchaser thereat acquired no interest in the land sold. As the plaintiff's rights were predicated upon this sale, he failed to establish title to the land in himself, upon the trial.

Judgment affirmed.

POWER OF ATTORNEY GIVEN BY TWO OR MORE, CONSTRUCTION OF.— Under the well-established rule that a power of attorney must receive a strict construction, it is well settled that where the power is given for a particular purpose, general words therein are not to be construed at large, but merely as giving a general authority for carrying into effect the special purpose for which the power is given: *Roundtree* v. *Denson*, 59 Wis. 522; *Brantley* v. *Southern Life Ins. Co.*, 53 Ala. 554. In other words, the larger powers conferred by the general terms must be construed with reference to the matters specially mentioned: *Rossiter* v. *Rossiter*, 8 Wend. 494; 24 Am. Dec. 62. Under this line of reasoning the court said, in *Johnston* v. *Wright*, 6 Cal. 373–376: "From all the authorities and the reasoning deduced from them, it appears to be a well-established rule that where, in powers, covenants, releases, and other contracts, a several interest is alone expressed and referred to, no general terms will allow the meaning to be extended to a joint interest. In the case before us, the power refers the attorney to 'demands between me and any person or persons,' and to 'debts or demands owing to me.' This language must, in interpretation, be confined to such debts and demands whereof the principal had a several and sole interest, and cannot be made to include a covenant which he jointly held with others." Consequently it was decided in this case that a power of attorney authorizing the attorney "to settle and adjust all partnership debts, accounts, and demands and all other accounts and demands now subsisting, or which may hereafter subsist, between me and any person or persons whatever," and to execute releases for such purposes, does not confer a power to release a covenant of guaranty made to the principal and others jointly, for the payment of rent and purchase-money of property sold by them as tenants in common.

In *Holladay* v. *Daily*, 19 Wall. 606–610, the court said: "Undoubtedly, it is a rule that a special power of attorney is to be strictly construed so as to sanction only such acts as are clearly within it terms; but it is also a rule of equal potency that the object of the parties is always to be kept in view, and where the language used will permit, that construction should be adopted which will carry out, instead of defeating, the purpose of the appointment. Here the object, and the sole object, of the power was to

enable the attorney to pass the title freed of any possible claim of the wife, and under the law of Colorado that result would be accomplished by the deed of the husband alone, as fully without as with her signature. A power of attorney made by two or more persons possessing distinct interests in real property may, of course, be so limited as to prevent a sale of the interest of either separately; but in the absence of qualifying terms or other circumstances thus restraining the authority of the attorney, a power to sell and convey real property, given by several parties in general terms, as in the present case, is a power to sell and convey the interests of each, either jointly with the interests of the others, or by a separate instrument. The cases are numerous where the power given by several has been held invalid as to some of the parties, and yet sufficient to authorize a transfer of the title of the others. The decision of those cases has proceeded on the doctrine stated, that where a power is given by several, the interest of each in the property to which the power refers may be separately transferred." In this case it was decided that a power of attorney to sell and convey real property given by a husband and his wife, in general terms, without any provision against the sale of the interest of either separately, or other circumstance restraining the authority of the attorney in that respect, authorizes a conveyance by the attorney of the interest of the husband, by a deed executed in his name alone. A power of attorney executed jointly by husband and wife for the sale and conveyance of all their property, in which the words "we," "us," and "our" were exclusively used, will not authorize a sale and conveyance of property the title to which is in the husband alone, in the absence of extrinsic proof of the non-existence of joint property by them: *Dodge* v. *Hopkins*, 14 Wis. 630. So a deed purporting to be executed under power of attorney from two grantors, supported by some evidence of the existence of a joint power from them, while only a power from one of them individually is produced, will not support the theory that the execution of the deed can be referred to such separate power, so as to uphold it as the deed of the grantor who had given such power: *Davenport* v. *Parsons*, 10 Mich. 42; 81 Am. Dec. 772. The foregoing are all the authorities we have been able to discover bearing upon the precise question involved in the principal case, which is, whether, when a power of attorney is given by two persons to a third, it is to be construed as authorizing him to act only in matters in which they have a joint interest. The question is by no means so free from doubt as it was assumed to be in the principal case. In fact, the language of the supreme court of the United States quoted above seems to be wholly irreconcilable with the decision in the principal case, and to show that a power of attorney from two or more persons, unless restricted in its terms, authorizes the agent to act for either as well as for both. In this connection it would not seem out of place to state that a power, given to sell the separate estate of a wife, does not authorize a mortgage of such property for the purpose of paying the debts of the husband: *Hirschman* v. *Brashears*, 79 Ky. 258; and that the wife may appoint her husband, by power of attorney, as her agent and attorney in fact to convey the inchoate interest which she holds in his real estate, and that an instrument executed by himself, and by him for her, under such authority is effectual to transfer such interest: *Munger* v. *Baldridge*, 41 Kan. 236; 13 Am. St. Rep. 273.

McVEETY v. ST. PAUL, MINNEAPOLIS, AND MANITOBA RAILWAY COMPANY.

[45 MINNESOTA, 268.]

COMMON CARRIERS — PARTY ON FREIGHT TRAIN NOT PAYING FARE, WHEN ENTITLED TO RIGHTS OF PASSENGER. — Where the conductor of a train disobeys the rules of the company for which he is acting, in regard to the collection of fare from a passenger, and permits him to be upon a forbidden part of the train, or upon a train not allowed to carry passengers, the traveler has all the rights of a passenger, if without notice, express or implied, of the rules or of the conductor's disobedience.

COMMON CARRIERS — PARTY ON TRAIN NOT PAYING FARE, WHEN NOT ENTITLED TO RIGHTS OF PASSENGER. — Where a person solicits and secures free transportation, or rides upon a part of the train from which passengers are excluded, or takes passage upon a train not allowed to carry passengers, knowing that his act is against the rules of the company, and that in permitting it the conductor is disobedient, he is guilty of a fraud, and not entitled to a passenger's rights to recover for injury.

M. D. Grover and R. A. Wilkinson, for the appellant.

J. J. Woolly, F. E. Latham, and Wendell and Pidgeon, for the respondent.

COLLINS, J. On the trial of this action, it was defendant's contention that although plaintiff was on its train — a freight with a caboose attached — when the accident occurred in which he claims to have been injured, he was not a passenger to whom it owed any duty. Testimony was introduced tending to show that plaintiff had not paid his fare; had no ticket; that on boarding the train he had solicited the conductor, an acquaintance, to permit him to ride without paying his fare; and that the latter had consented. The defendant then offered to prove by the conductor that when soliciting that he be carried without paying his fare, the plaintiff knew that the conductor had no authority to allow it. To this offer the court sustained an objection, defendant duly excepting. This ruling was erroneous, and a new trial must be had. It is probable that there is authority for the statement that when the conductor of a train disobeys the rules of the company for which he is acting, in regard to the collection of fare from a traveler, or in respect to some other matters, such, for instance, as permitting him upon a forbidden part of the train, or upon a train not allowed to carry passengers, the traveler has all the rights of a passenger, if he has no notice of the rule, express or implied, or of the conductor's disobedience. But if a person solicits and secures free transportation, or if he rides upon a

part of the train from which passengers are excluded, or takes passage upon a train not allowed to carry passengers, knowing that his act is against the rules of the carrier and in permitting it the conductor is disobedient, he is guilty of a fraud, and not entitled to a passenger's rights: *Toledo etc. R'y Co.* v. *Brooks*, 81 Ill. 245; *Toledo etc. R'y Co.* v. *Beggs*, 85 Ill. 80; 28 Am. Rep. 613; *Robertson* v. *N. Y. & Erie R'y Co.*, 22 Barb. 91; *Union Pacific R'y Co.* v. *Nichols*, 8 Kan. 505; 12 Am. Rep. 475; *Prince* v. *International etc. R'y Co.*, 64 Tex. 146; *Gulf, Colorado, and Santa Fé R'y Co.* v. *Campbell*, 76 Tex. 174. The defendant had been allowed by the court to introduce testimony tending to establish its claim that the plaintiff had obtained the conductor's consent to his riding without payment of fare, and it should have been permitted to go further, and prove, if it could, that plaintiff knew that, in securing this consent, he had induced the conductor to violate a rule of the railway company.

Order reversed.

CARRIERS — PASSENGERS — RIDING ON FREIGHT TRAINS — TRESPASSERS. — A party obtaining a free ride on a railroad train without the consent of the carrier cannot recover for injuries received, in the absence of proof of gross negligence: *Chicago etc. R. R. Co.* v. *Mehlsack*, 131 Ill. 61; 19 Am. St. Rep. 17, and extended note; *Bricker* v. *Philadelphia etc. R. R. Co.*, 132 Pa. St. 1; 19 Am. St. Rep. 585, and note. A person who goes aboard a freight train by the invitation or permission of the conductor cannot be regarded as a passenger, if it is in violation of the rules of the company: *Smith* v. *Louisville etc. R'y Co.*, 124 Ind. 395; *Gulf etc. R'y Co.* v. *Campbell*, 76 Tex. 174. One who voluntarily takes passage on a freight train assumes the risks incident to such a mode of transportation: *Louisville etc. R'y Co.* v. *Bisch*, 120 Ind. 549; *Crine* v. *East Tennessee etc. R'y Co.*, 84 Ga. 651; *Haase* v. *O. R. & N. Co.*, 19 Or. 354; *contra*, *McGee* v. *Missouri etc. R'y Co.*, 92 Mo. 208; 1 Am. St. Rep. 706, and note; *Whitehead* v. *St. Louis etc. R'y Co.*, 99 Mo. 263.

TAYLOR *v.* SULLIVAN.

[45 MINNESOTA, 309.]

OFFICE AND OFFICERS — TENURE — ELECTION OF INELIGIBLE SUCCESSOR — QUO WARRANTO. — An incumbent of an office who is entitled to hold for a fixed period, and until his successor is elected and qualified, is entitled to hold over in the event of the election of an ineligible successor, and has such interest in the election that he may question its legality by *quo warranto*.

OFFICE AND OFFICERS — INELIGIBILITY. — A foreigner, constitutionally ineligible to election to office at the time of his election, for want of declaration of intention to become a citizen, cannot hold the office, although after election, and before the commencement of his term of office, he duly declares such intention.

APPLICATION for a writ of *quo warranto*.

Taylor, Calhoun, and Rhodes, for the petitioner.

Theodore Bruener, for the respondent.

DICKINSON, J. By this proceeding, the relator seeks an adjudication as to the right of the respondent to hold the office of county attorney of Stearns County, for which office he received a majority of the votes cast at the general election in 1890. The point of contention is, whether the respondent was legally elected, and can hold the office under such election, he being of foreign birth, and having never declared his intention to become a citizen of the United States until after such election. The contention that the relator has no such private interest in the matter as justifies him to invoke a decision upon it is not sustained. The relator was elected to the office at the election in 1888, qualified, and entered upon the discharge of its duties. He is still the incumbent of the office, unless he has been superseded by the respondent, or unless a vacancy has occurred by force of the statute. The term of office for which the relator was elected was "two years, and until his successor is elected and qualified": Gen. Stats. 1878, c. 8, sec. 210. If the election of the respondent was not legally authorized, the relator would continue to hold the office by force of this express provision of the statute: *State* v. *Benedict*, 15 Minn. 153 (198); *People* v. *Tilton*, 37 Cal. 614. The case in this particular is distinguishable from that of *County of Scott* v. *Ring*, 29 Minn. 398. We therefore hold that the relator's interest entitled him to call in question the legality of the respondent's election.

We come then to the question of the right of the respondent to hold the office by virtue of his election in 1890. It appears that at the time of the election the respondent was not a citizen of the United States, and had not declared his intention to become a citizen, conformably to the laws of the United States upon the subject of naturalization. He relies, however, upon the fact that after the election, and before the commencement of the term of office for which he was elected, he duly declared his intention to become a citizen, and so the fact is shown to be. It is not to be questioned that at the election in 1890, the respondent was not entitled to vote at any election in this state. The constitution (article 7, sections 1, 2) so declares. Section 7 of the same article reads: "Every person who, by the provisions of this article, shall be

entitled to vote at any election shall be eligible to any office which now is, or hereafter shall be, elective by the people in the district wherein he shall have resided thirty days previous to such election, except as otherwise provided in this constitution, or the constitution and laws of the United States." This was intended as a restriction, and it has the effect of a constitutional declaration that only such persons as by the provisions of this article are entitled to vote shall be "eligible" to any elective office. We need not dwell upon this proposition, for the argument for the respondent virtually concedes it. He rests his case upon the proposition that this restriction refers merely to the holding of office, and not to elections, and hence that he was legally entitled to the office, because his disqualification was removed before the commencement of the term, although subsequent to the election.

This question has not been heretofore decided in this state. The terms of the statute construed in *Territory ex rel.* v. *Smith*, 3 Minn. 164 (240), 74 Am. Dec. 749, were such that the decision has no bearing upon the construction of the very different language of the constitutional provision under consideration. The case of *Barnum* v. *Gilman*, 27 Minn. 466, 38 Am. Rep. 304, relating to a different constitutional provision, did not involve the question here presented, although language was used in the opinion of the majority of the court in harmony with the contention of this respondent. Our inquiry is as to the meaning of the word "eligible" as used in the constitution. In Webster's Dictionary its meaning is defined to be, "proper to be chosen; qualified to be elected." In this and the cognate words derived from the same source (the Latin verb *eligere*), the idea primarily involved is that of choosing, selecting. It is expressed in our verb "to elect," derived from the same Latin word. This primary and strictly proper signification of the word "eligible" is also its well-understood popular meaning. If we had adopted the form "electible" for the adjective, instead of following more nearly the form of the verb from which it is derived, the meaning might have been more obvious, but it would not have been different. There seems to be no sufficient reason why the proper and ordinary meaning should not be given to the word "eligible" in the constitution, as though it had read, "no person shall be qualified to be elected," etc. This is the plain and natural construction of the language, and the other provisions, with which that immediately under consideration is associated, add to the

probability that this word was intended to refer to the election to office, and not merely to the holding of office. The whole article relates to the elective franchise. It declares the disability of certain classes, including persons of foreign birth who have not declared their intention to become citizens of the United States, to vote at any election. That declared disability certainly relates to the time when an election takes place. Closely associated with this is the provision in question, which, in legal effect, declares that the persons thus disqualified to vote shall not be "eligible to any office" elective by the people. Neither the proper signification of the language, nor the context, justifies the conclusion that at this point there is an abrupt transition in the subject from elections to the holding of office. Elsewhere in the constitution we do find express provision relating to disqualification for holding office, as in section 11 of article 6, and in section 9 of article 4.

Again, the positive and unambiguous restriction upon the right to vote at any election is in itself a reason supporting the conclusion that when the disqualified classes are declared to be ineligible to any elective office, it was meant that they could not be legally elected, or "electible," if we may use such a word. There is little reason to suppose that it was intended that persons who, by reason of their alienage, or for other specified reasons, were expressly excluded from the right to vote at any election should still be deemed qualified to be elected to any office. In *State* v. *Murray*, 28 Wis. 96, 9 Am. Rep. 489, it was considered to be a fundamental principle of popular government, even in the absence of any constitutional or statutory restriction, that one who is not a qualified elector cannot legally hold an elective office. According to the opinion of Ryan, C. J., in the later case of *State* v. *Trumpf*, 50 Wis. 103, this proposition should, in principle, be more broadly stated, and only such persons as are themselves electors at the time of the election should be deemed to be eligible to office. We think that this must certainly be so considered under a constitution which, in effect, declares than only such persons shall be eligible to elective offices.

The construction which we place upon the constitution is supported by *Searcy* v. *Grow*, 15 Cal. 118; *State* v. *Clarke*, 3 Nev. 566; *State* v. *McMillen*, 23 Neb. 385. In *Smith* v. *Moore*, 90 Ind. 294, — followed in *Vogel* v. *State*, 107 Ind. 374, — the word "eligible" was construed as referring to the time of the commencement of the term for which a person is elected.

The dissenting opinion of Elliott, J., referring to the earlier decisions in that court, is worthy of attention.

Our conclusion is, that, as the case now appears, the respondent was not legally elected to the office, and that his subsequent declaration of his intention to become a citizen does not entitle him to hold the office. It is therefore ordered that the respondent's motion to dismiss the order to show cause be denied, and that the application of the relator for a writ of *quo warranto* be granted.

OFFICE AND OFFICERS, REMEDY TO TRY TITLE TO — QUO WARRANTO. — Title to office must be determined by *quo warranto: Hamlin* v. *Kassafer*, 15 Or. 456; 3 Am. St. Rep. 176, and note; *Greenwood* v. *Murphy*, 131 Ill. 604; *Frey* v. *Michie*, 68 Mich. 323; *Prince* v. *Boston*, 148 Mass. 235; *Hinckley* v. *Breen*, 55 Conn. 119; *Neeland* v. *Kansas*, 39 Kan. 154.

OFFICE AND OFFICERS — HOLDING OVER. — When an officer holds over after the expiration of his term, his acts are those of a *de facto* officer, and valid as to third persons: *Hamlin* v. *Kassafer*, 15 Or. 456; 3 Am. St. Rep. 176, and note. An office does not become vacant by the expiration of the term of the incumbent, but he continues a *de jure* officer until his successor is duly appointed and qualified: *State* v. *Howe*, 25 Ohio St. 588; 18 Am. Rep. 321; *People* v. *Tyrrell*, 87 Cal. 475.

OFFICE AND OFFICERS — ELIGIBILITY. — Qualification of a candidate for office should be consummate at the time of the election, and it will not do that it becomes so before time for him to qualify and enter upon the duties of his office: *Parker* v. *Smith*, 3 Minn. 240; 74 Am. Dec. 749; *contra*, see *Brown* v. *Goben*, 122 Ind. 113. Where the legislature may prescribe the qualifications for an office, it may prescribe that they shall exist at the time of the election: *State* v. *Williams*, 99 Mo. 291.

An alien who has not declared his intentions to become a citizen of the United States may be elected to a public office, and may hold the same in case his disability is removed before the term of office begins: *State* v. *Murray*, 28 Wis. 96; 9 Am. Rep. 489.

SKOGLUND *v.* MINNEAPOLIS STREET RAILWAY CO.

[45 MINNESOTA, 330.]

JUDGMENTS — MERGER — INJURIES TO HUSBAND AND WIFE BY SAME ACT OF NEGLIGENCE — SUCCESSIVE RECOVERIES BY HUSBAND. — Where husband and wife are both at the same time injured by the same act of negligence, a recovery by the husband for the injury to himself is not a bar to a subsequent action by him to recover for the loss of the society and services of his wife, and expenses incurred in curing her of the injury received.

Merrick and Merrick, for the appellant.

Koon, Whelan, and Bennett, for the respondent.

GILFILLAN, C. J. The plaintiff and his wife, while riding in one of defendant's cars, were both at the same time injured by the same accident or act of negligence of defendant. Plaintiff brought an action, and recovered for the injury to himself. He brings this action, alleging the negligence of the defendant, the injury to his wife, in consequence whereof he lost her services and society, and was put to expenses for physicians and medicines and the care of his wife. In its answer the defendant alleged the former action and recovery by plaintiff in bar of this action, and the court below held it a bar, and ordered judgment for defendant on the pleadings. This appeal is from an order denying plaintiff's motion for a new trial. The case raises the question, Was the cause of action in the first action the same as in this? Is this an attempt to recover damages that belonged to that cause of action? We think the decision of the court below was erroneous, not because one action was to recover for an injury to what are termed the absolute rights of plaintiff, and the other for injury to his relative rights, or rights he possessed by reason of his relation to his wife, but because his right to recover in this case will depend on a different state of facts from those which would sustain a recovery in the other case. In the action for injury to himself, all he needed to show, in order to recover nominal damages at least, was the negligence of the defendant, and the consequent injury to himself. But proof of the negligence and injury to the wife would not sustain the husband's action in this case. The cause of action which those facts alone show belongs to the wife. Those facts go to make up the husband's cause of action, but alone they are not enough. In addition to them there must exist the fact that, by reason of the injury so caused, he has been deprived of her society or services, or has been put to expense. Such loss is of the substance of his cause of action.

As said in *Todd* v. *Redford*, 11 Mod. 264: "Husband and wife cannot join in assault and battery *per quod consortium amisit*, for the *per quod* in such case is the gist of the action." In other words, the gist of the husband's cause of action on account of an injury to his wife is not the injury itself, but the consequence of the injury in depriving him of his common-law right to her society or services, or in imposing on him the common-law duty to care for her. A case may easily be imagined where, for an injury to her person, a cause of action — a technical cause of action, at least — would instantly accrue

to the wife, but where none would ever accrue to the husband, for the reason that none of the above injurious consequences to his relative rights would follow. Where a cause of action arises from a wrongful injury, it arises at once; and in such case the subsequently ascertained or developed consequences of the injury are items that might exist without them. But in an action by a husband on account of an injury to his wife, the consequences of loss of her society or services are not items of damages pertaining to an already existing cause of action, or to a cause of action which might exist without them, but they are essential to the cause of action itself, which cannot arise until such consequences have followed the injury. If it could be said that the plaintiff's cause of action in his first action arose upon the negligence alone, then all the injurious consequences of that negligence, the injury to his person, the loss of his wife's society and services, caused by the injury to her person, might be regarded as items of damage in that cause of action. But no cause of action could accrue upon the negligence alone. That cause of action accrued only upon injury to his person caused by the negligence, and when they concurred, his cause of action was complete. The loss of his wife's services had no connection with that injury. That cause of action was not a consequence of it, and not an item of damage pertaining to it. His right to recover for such loss was independent, and would have existed had that cause of action not accrued.

We have been able to find but two cases in the United States analogous to this. In *Cincinnati etc. R. R. Co.* v. *Chester*, 57 Ind. 297, the plaintiff had joined in one count a cause of action for an injury to himself with a claim for damages for loss of services of his wife, and for expenses in healing injuries to his child; the three having been injured at the same time by the same negligence of defendant. On defendant's motion to require plaintiff to state the separate claims for damage in separate counts or paragraphs, the supreme court held the motion properly denied, saying: "It seems to us they would really constitute but a single cause of action." *Town of Newbury* v. *Connecticut etc. R. R. Co.*, 25 Vt. 377, was an action by the town to recover damages it had been compelled to pay for an injury to the person caused by a defect in a highway which, as between it and the town, defendant was under a duty to keep in repair. Husband and wife were at the same time injured in consequence of the defect. The hus-

band sued the town for the injury to himself, recovered judgment, which the town paid, and sued and recovered against defendant for that. The husband also sued the town and recovered judgment on account of the injury to his wife, and the town paid it, and sued defendant for it. The defendant pleaded in bar the former recovery against it. Speaking of the recovery against the town on account of the injury to the wife, in reference to the recovery for injury to the husband, the court, Redfield, C. J., said: "For it is as much a distinct matter as if the persons had been strangers to each other, and as much, I think, as if the persons had been injured at different times by reason of the same neglect of defendant." The two cases seem directly opposed to each other, though neither is particularly satisfactory as an authority. So far as they determine the question here involved, the latter is more consistent with principle.

Order reversed.

HUSBAND AND WIFE — ACTIONS FOR INJURIES TO WIFE. — Two actions will lie, as a general rule, for a tort committed upon a wife: 1. By the husband alone, for the loss of services, expenses, etc.; 2. By the husband and wife, for the injury to the wife's person: *Rogers* v. *Smith*, 17 Ind. 323; 79 Am. Dec. 483, and note 484, 485; *Smith* v. *St. Joseph*, 55 Mo. 456; 17 Am. Rep. 660.

RAMSEY *v.* GLENNY.

[45 MINNESOTA, 401.]

ADVERSE POSSESSION UNDER MISTAKE IN BOUNDARY. — An entry upon and more than twenty years' subsequent possession of land beyond the line of his own lot by an adjoining owner under claim of title, and under a mistake as to the location of the boundary line, must be deemed adverse to the true owner, so as to extinguish his title and vest it in the party in possession.

ADVERSE ENTRY BY TENANT — ADVERSE POSSESSION BY LANDLORD. — Where an original adverse entry upon and possession of land is made by an adjoining owner's tenant, under a mistake by both as to the location of the boundary line, and this is followed by a new lease of the whole premises to the same tenant, especially mentioning a building previously erected by the tenant on land beyond the true boundary line, the adverse possession of the landlord begins when the tenant entered under the second lease.

ADVERSE ENTRY BY TENANT — ADVERSE POSSESSION BY LANDLORD AND HIS HEIRS OR THEIR GRANTEES. — The connected, successive, and continuous possession of a landlord by his tenant, his heirs and their grantees, to the land in dispute may be tacked together so as to form a

continuous and uninterrupted possession adverse to the true owner for the period of time essential to give title by adverse possession.

ADVERSE POSSESSION. — PRIVITY REQUISITE BETWEEN SUCCESSIVE HOLDERS, to constitute adverse possession, is, that the latter holder must take under the earlier, as by descent, by will, by grant, or by voluntary transfer of possession.

ADVERSE POSSESSION, CONTINUITY OF POSSESSION BY SUCCESSIVE HOLDERS, HOW EFFECTED. — Continuity and connection of adverse possession by successive holders, so that the possession of the true holder will not intervene, may be effected by any conveyance or understanding which has for its object a transfer of the rights of the possessor or of his possession when accompanied by an actual transfer of the possession.

ADVERSE POSSESSION — EFFECT OF EXCEPTION IN CONVEYANCES ON ADVERSE CLAIM. — Where a party and his successors in interest, in adverse possession of certain land under a mistake as to the boundary line, make deeds and leases of such land, excepting therein the easterly two feet thereof, previously conveyed, the exception in the deeds and leases cannot be treated as declarations by the parties making them that they made no claim to the land held adversely by mistake, or as conclusive evidence that they did not hold, or claim to hold, adversely to the true owner.

ADVERSE POSSESSION — EFFECT OF ABSENCE OF DISSEISOR FROM STATE. — A party or his successor in interest in adverse possession of land may continue such possession by his tenant, and the absence of the landlord from the state will not interrupt the running of the statute of limitations, as the true owner has his right of action against the tenant to recover possession.

Davis, Kellogg, and Severance, for the appellant.

Flandrau, Squires, and Cutcheon, for the respondents.

COLLINS, J. Action of ejectment, in which judgment was entered for defendants in the trial court, upon the ground that the premises had been held by the defendants and their grantors adversely to the plaintiff for a period of more than twenty years prior to the commencement of the action. There was but little controversy over the facts. In the year 1862 plaintiff owned the westerly half of lot 13, block 23, St. Paul proper, and also a strip adjoining the same on the west, being the easterly two feet of lot 12 in the same block, upon which he had previously erected a frame building. One Mack was the owner of the remainder of lot 12. These lots were about 130 feet in depth, and faced upon Third Street. Mack had, the year before, leased to Nicols and Dean the easterly twenty-eight feet of his lot for a period of five years. In 1862 he erected for their use and occupancy, as his tenants, a stone building reaching from the front of his premises back about seventy-five feet. Thereafter, but prior to June 4, 1866, the tenants built a shed extending from the stone building to the

rear of the lot, the easterly wall thereof being of stone, and on the same line as the easterly wall of the building. It was not as high as this wall, but, substantially, a continuation of it. Mack supposed and believed when he erected his building that it was upon his own premises, and that the east wall thereof was on the line between himself and plaintiff. His tenants, when building the shed, supposed and believed that the east wall thereof was upon the leased premises; and both of these parties supposed and believed when the lease was made in 1862 that the line between the tracts of land was that afterwards fixed and occupied by the easterly walls of the building and shed, when in fact the walls of the building and of the shed encroached upon the plaintiff's land along their entire length. The strip of land in controversy is that covered by this encroachment. Mack died in 1870, his interest descending to his widow and heirs at law, who sold to these defendants in 1883. These respective owners have been, by themselves or by their tenants, in open and notorious possession of the stone building and the shed, and the land upon which they stood, from the time the building and shed were erected. Such possession has been continuous and uninterrupted for more than twenty years prior to the commencement of this action, and the fact that the walls were standing all of this period of time was patent to the plaintiff, although he may not have been aware of the fact that any part of the same were upon his land.

It is argued by plaintiff, appellant, that because Mack and his tenants, Nicols and Dean, entered into the actual possession of this strip of land through mistake, and without any intent to do so, and because the former and those who have succeeded him have held possession without realizing that a part of the stone walls had been built over the line, such possession could not be accompanied with an intent to claim adversely, and hence was at no time hostile to the true owner. But on this point, and to the extent of that part of the disputed strip covered by the wall of the building, the case cannot be distinguished from *Seymour* v. *Carli*, 31 Minn. 81. In that case it appeared that Carli and his grantors had owned and had been in possession of a certain lot for more than twenty years, and that for the same period of time Seymour, Sabin, & Co., and their grantors, had owned and been in possession of an adjoining lot, save as to that portion in dispute. More than twenty years prior to the commencement of the action, Carli's grantors had erected a house wholly on their

own lot, as was supposed, but by reason of a mistake as to the location of the line, a part of the building was placed on the adjoining lot, then owned by the grantors of Seymour, Sabin, & Co., and there it had remained for more than twenty years, under no other claim than that of title to the lot on which the parties intended to erect it. It was held that the actual, exclusive possession of Carli and his grantors was, to the extent of their occupancy, adverse, notwithstanding the original entry and possession thereunder were by mistake. The facts which appear in that case and those here, so far as they relate to the erection of the stone building and its occupancy, are almost identical. No distinction can be made, except as to certain documentary testimony consisting of deeds and leases made by Mack and his successors, to which reference will be made later.

As before stated, the shed was built by Mack's tenants more than twenty years before the commencement of this action, and had it been erected by him, no difference would exist between the facts concerning it and those which surround the erection and occupancy of the building; the conclusion in the Carli case would apply to the entire strip covered, as it has been, by the easterly walls of the building and shed. The court below found that the shed was erected with the assent of Mack, entry being made on the land under a claim of right as his tenants, and that in fact it was the landlord's intention by his lease to cover and embrace, and both landlord and tenants then believed that it did cover and embrace, all of the land upon which the structures were erected. The original lease was not introduced in evidence, having been lost; but it is undisputed that in the description the easterly two feet of lot 12 were excluded. The entry subsequently made by the tenants thereon when they built the shed wall was undoubtedly under the belief (common to all parties, it seems) that plaintiff's frame building was upon his westerly line, and consequently the stone building, which was as close to it as possible, was upon Mack's easterly line, and also — a most natural conclusion — that the line in the rear of the building was an extension of that upon which it stood. The testimony sustained the finding as to what was supposed and believed by Mack and his tenants as to the true line when the latter built the stone wall. There was no testimony tending to show that Mack positively or openly assented to the construction of this wall or the shed. But taking into consideration his be-

lief as to where the line was, that he had put his tenants in possession of the building which stood over the real line, and that the construction and maintenance of the shed was a proper use of the leased premises, his assent may readily be inferred. But this is not very material, for by means of the lease to John Nicols of date June 4, 1866, it clearly appears that Mack was then asserting title to that part of the premises upon which his tenants had previously erected the shed wall; for he then, in express terms, leased it for the period of five years commencing October 22, 1866, on which day the lease to Nicols and Dean terminated. In this instrument special mention was made of the rear of the lot, that part about fifty feet back of the stone building, and also of the shed or building, as it was therein called, erected by the tenants. The earlier lease to Nicols and Dean, bearing date October 22, 1861, "of the same property," was also therein referred to and recognized. At the expiration of this earlier lease, there was, in contemplation of law, surrender of the entire premises occupied by Nicols and Dean, including both buildings, to Mack, and he at once put the new tenant in possession of all of the same. Had the latter been ejected by this plaintiff from that part of the leased estate now in controversy, the landlord, Mack, would have been liable on his covenants in the lease. If the latter had not previously taken possession or asserted any claim to that strip of land covered by a part of the shed wall, and if the original entry by his tenants, and their subsequent occupation for about two years, cannot be declared his, his adverse and hostile claim, his possession by means of his tenant Nicols, must at least date from the commencement of the latter's term, in October, 1866, more than twenty years prior to the commencement of this action. It is obvious that his exclusive, adverse, and hostile occupation and possession began then, if it had not before that time.

But it is claimed by plaintiff's counsel that the successive possessions of Mack by his tenants, of his heirs and their grantees, to the litigated premises cannot be tacked together so as to form a continuous and uninterrupted possession adverse to the plaintiff for the essential period of time; citing *Sherin* v. *Brackett*, 36 Minn. 152; *Witt* v. *St. Paul etc. R'y Co.*, 38 Minn. 122, 129. The rule is there clearly stated. The privity spoken of and requisite is that existing between two successive holders, when the latter takes under the earlier, as by descent, or

by will or grant, or by a voluntary transfer of possession. In this case, the first tenants surrendered, and Mack gave possion, in 1866, to Nicols of the entire premises covered by the easterly walls of his two-story building and of the shed in its rear, with full belief as to ownership. The plaintiff had previously been disseised, and this disseisin was in no way interrupted thereafter. The buildings, with their easterly walls, remained, and were successively transferred to the present defendants in 1883. The adverse possession was connected as well as continuous, so that the possession of the true owner did not constructively intervene. Such continuity and connection may be effected by any conveyance or understanding which has for its object a transfer of the rights of the possessor or of his possession, when accompanied by an actual transfer of possession: *Vandall* v. *St. Martin*, 42 Minn. 163.

We have mentioned that plaintiff's counsel place much reliance upon a clause in the descriptive part of certain deeds and leases, executed either by Mack in his lifetime or by those in privity with him, his heirs or their grantees. In each of these instruments the premises were described, substantially, as the easterly thirty feet of lot 12, excepting the easterly two feet previously conveyed to Ramsey; and further, in each the stone building is mentioned, and is described as standing on the conveyed premises, when it did not, altogether, in fact. The counsel insist that the exceptions of the strip of two feet in these deeds and leases are declarations by Mack and his successors that they made no claim to that part of the strip now in litigation on which the buildings stood, and must be considered as conclusive evidence that Mack, his heirs and their grantees, did not hold, or claim to hold, adversely. If it had appeared in evidence that, when executing these instruments and reciting the exception therein, Mack and his successors knew of the encroachment, and that in erecting their buildings they had trespassed upon the plaintiff, there might be merit in the counsel's contention; but the testimony is to the contrary. All parties supposed and believed the structures were on the line, and not over it.

The point is made that Mack, who died in 1870, and likewise his heirs, whose interests were not transferred until 1883, were not residents of, nor could they have been found within, the state. It has been held at the present term of this court that the exceptions found in General Statutes of 1878, chapter

66, section 15, do not apply in actions to recover real property, or to recover the possession of the same: *City of St. Paul* v. *Chicago etc. R'y Co.*, 45 Minn. 387.

Judgment affirmed.

ADVERSE POSSESSION — MISTAKE IN BOUNDARY. — Where a person, by mistake, incloses land of another, his actual and uninterrupted possession for the time prescribed will give him a good title to the land: *Levy* v. *Yerga*, 25 Neb. 764; 13 Am. St. Rep. 525, and note; but such adverse possession must be intentional and under color of title: *McDonald* v. *Fox*, 20 Nev. 364; *Skinker* v. *Haagema*, 99 Mo. 208.

ADVERSE POSSESSION — TACKING — PRIVITY — CONTINUITY OF POSSESSION. — To render possession adverse, it must be continuous: *Turner* v. *Hart*, 71 Mich. 128; 15 Am. St. Rep. 243, and note. To bar a plaintiff's claim by adverse possession, it does not make any difference whether the possession was held by one or by a succession of individuals, if the possession was continuous: *Shannon* v. *Kinny*, 1 A. K. Marsh. 3; 10 Am. Dec. 705. The adverse possession of the heir may be tacked to that of the ancestor: *Duren* v. *Kee*, 26 S. C. 219. The adverse possession of a receiver may be tacked to that of the debtor: *Verdery* v. *Savannah etc. R'y Co.*, 82 Ga. 675. Adverse possession of assignor may be tacked to that of the assignee: *Brown* v. *Brown*, 106 N. C. 451. To make out an adverse possession for the statutory period by tacking, privity between them must be shown, and a continuity of possession without breach: *Louisville etc. R. R. Co.* v. *Philyaw*, 88 Ala. 264; *Ross* v. *Goodwin*, 88 Ala. 390.

FARWELL *v.* ST. PAUL TRUST COMPANY.

[45 MINNESOTA, 495.]

NEGOTIABLE INSTRUMENTS — INDORSER'S LIABILITY CANNOT BE VARIED BY PAROL. — If an indorser wishes to qualify his liability, he must use apt words therefor, or must in some other manner clearly indicate that his indorsement is limited to a transfer of the paper and nothing more. His liability cannot be changed or varied by parol evidence.

NEGOTIABLE INSTRUMENTS — INDORSER'S LIABILITY CANNOT BE VARIED BY PAROL. — The indorsee cannot show, as against the indorser of negotiable paper, that at the time of indorsement it was verbally agreed that presentment for payment, notice thereof, and of non-payment, need not be made or given.

NEGOTIABLE INSTRUMENTS — INSOLVENCY OF MAKER DOES NOT EXCUSE PRESENTMENT. — The indorsee must present the note at the place fixed for payment at its maturity, and his failure to do so will not be excused by the insolvency of the maker or his removal from the state.

PARTNERSHIP — USE OF FIRM MONEY BY PARTNER TO PAY HIS INDIVIDUAL DEBT — BURDEN OF PROOF. — A general partner cannot, without the consent, express or implied, of the other members of the firm, use the funds or property of the firm to pay, settle, or cancel his individual debts; and a creditor receiving such funds or property, having knowledge that they were misappropriated, cannot retain the same, and must assume the burden of proving the consent of the other partners.

Howard L. Smith, for the appellants.

John B. and W. H. Sanborn, for the respondent.

COLLINS, J. In the consideration of this case it will be assumed without discussion, and without deciding the point, that Ettelsohn, who attempted to become a special partner in the firm of E. Allen & Co. (see *In re Allen*, 41 Minn. 430), possessed either the power and authority of a general partner or that of an agent when transacting the business with appellants out of which arise their claims against respondent as receiver in insolvency. This assumption brings us at once to a brief statement of the facts surrounding the transaction, and to the merits.

Allen and Levinson were general partners, looking after a mercantile business in St. Paul. Appellants were engaged in the wholesale trade in Chicago, where Ettelsohn resided. E. Allen & Co., the insolvents, were dealing quite extensively with appellants, and Ettelsohn was attending to nearly all of their part of the business. E. Allen & Co. had an opportunity to sell a bill of goods to Long and Glennon, traders at Mankato, Minnesota, upon time. Ettelsohn called upon appellants in reference to such a sale, and it was agreed that if the sale was made the latter would take Long and Glennon's notes upon account, when indorsed by Ettelsohn personally and by his firm. The sale was made, and the purchasers executed thirteen promissory notes, bearing date April 9, 1888, payable to their own order at intervals of fifteen days, the first, 235 days from date. These notes were then indorsed by Long and Glennon, delivered to Allen & Co., and immediately forwarded to Ettelsohn, who at once placed his own name and that of the firm upon the back of each, and delivered them to appellants, with the understanding that they should be discounted. This was done by appellants, and the trial court found as a fact that the proceeds were applied by the latter in payment of the balance then owing appellants by Allen & Co. on account of goods sold between September 1 and December 31, 1888. These notes were made payable at the office of the makers at Mankato, but were not presented there or elsewhere for payment as they matured. On January 19, 1889, Long and Glennon made an assignment under the insolvency act, and then removed from the state. To avoid the effect of a failure to present the notes at maturity, to give notice thereof, and of the makers' default, appellants offered

to prove on the trial that, at the time of the indorsement, demand upon the makers at maturity, notice thereof, and of non-payment, were verbally waived by the indorsers, Allen & Co. The question is by no means a new one, and goes to the competency, as between indorser and indorsee, of testimony tending to show that contemporaneously with the indorsement there was a parol agreement which materially changed the contract from what it appeared to be, and relieved one of the parties from the performance of certain acts otherwise resting upon him. To put it in other words, the object of their proposed testimony was to transform the contract from one of conditional to one of absolute liability.

From the earliest history of the state this court has steadily resisted the attempts which have frequently been made to vary or explain by parol the ordinary indorsement of a promissory note, by means of which the usual liability and contract of the indorser might be enlarged or diminished, made greater or less, as interest demanded. The most notable of the earlier cases was that of *Kern* v. *Von Phul*, 7 Minn 341 (426), 82 Am. Dec. 105, where a regular indorser in blank sought to show that he was an indorser without recourse. We do not feel called upon to review this line of cases, but content ourselves by saying that, while this precise question was in neither, it was practically settled by the reasoning and conclusion in the cases of *First Nat. Bank* v. *National Marine Bank*, 20 Minn. 49 (63); *Barnard* v. *Gaslin*, 23 Minn. 192; and *Knoblauch* v. *Foglesong*, 38 Minn. 352.

The contract of indorsement is twofold, — that of sale and transfer, and that of conditional liability. When in blank, as in the case at bar, all of the authorities concur in saying that a well-defined contract has been made, as full and complete as if explicitly expressed in writing. On what principle can it be urged, then, that testimony which would be incompetent and inadmissible to vary, alter, or control a written agreement can be receivable to vary, alter, or control, and even to destroy, the contract entered into by the regular indorser in blank? And if there is any rule of evidence, save in a few exceptional cases referred to in *First Nat. Bank* v. *National Marine Bank*, 20 Minn. 49 (63), whereby parol testimony may be received to vary or alter the contract, at what point short of that which may totally destroy it can the line be drawn? The contract is admittedly of the same force as though it were reduced to writing, and for that reason it can only be limited or enlarged

or impeached with safety by the same class of testimony. If the indorser wishes to qualify his liability, apt words are in common use which he must adopt, or he must in some other manner clearly indicate that his indorsement is limited to a transfer of the paper, and nothing more. If a transfer of title is desired, with a complete and unconditional assumption of liability by the indorser, equally as apt and common phrases are at hand which may be written above the indorser's signature, and the indorsee must see to it that they are used, thus relieving the transaction of its doubt and uncertainty. We regard it as of great importance that the rules respecting negotiable paper should be clear, and the whole story of its obligation should appear upon it. The indorsee must not be permitted, as against the indorser, to show that at the time of the indorsement it was verbally agreed that presentment for payment, notice thereof, and of non-payment, need not be made or given: *Bank of United States* v. *Dunn*, 6 Pet. 51; *Renner* v. *Bank of Columbia*, 9 Wheat. 581; *Dale* v. *Gear*, 38 Conn. 15; 9 Am. Rep. 353; *Bartlett* v. *Lee*, 33 Ga. 491; *Barry* v. *Morse*, 3 N. H. 132; *Charles* v. *Denis*, 42 Wis. 56; 24 Am. Rep. 383; *Bank of Albion* v. *Smith*, 27 Barb. 489; *Campbell* v. *Robbins*, 29 Ind. 271; *Rodney* v. *Wilson*, 67 Mo. 123; 29 Am. Rep. 499; *Hoare* v. *Graham*, 3 Camp. 57; *Free* v. *Hawkins*, 8 Taunt. 92.

We are aware of the existence of a very respectable number of authorities to the contrary, and that in some of the recent text-books the opposite rule is announced as fully supported by the decisions, including those of the highest federal court; citing *Union Bank* v. *Hyde*, 6 Wheat. 572, and *Sigerson* v. *Mathews*, 20 How. 496. Neither of these cases support the claim made for them, and, as will be seen upon examination of *Bank of United States* v. *Dunn*, 6 Pet. 51, the court referred to has decided the question in accordance with the views herein expressed. But in some of the state courts, and particularly by some of the text-book writers (judging from the indiscriminate manner in which authorities have been collected by the latter), it would seem as if the distinction which can easily be made between evidence which tends to establish a contemporaneous parol agreement and that which might prove a waiver of demand and notice, verbally, and subsequently to the indorsement, has been completely overlooked.

The claim that, because of the insolvency and absence from the state of the makers of the notes when the greater number matured, demand of payment of these and notice of

non-payment was excused is without merit. It was the duty of the appellants to present the notes as they matured at the place fixed for payment, notwithstanding the insolvency of the makers when a portion thereof matured, and their removal from the state at a time thereafter not definitely fixed in the findings: *Michaud* v. *Lagarde*, 4 Minn. 21 (43); *Hart* v. *Eastman*, 7 Minn. 50 (74); *Herrick* v. *Baldwin*, 17 Minn. 183 (209); 10 Am. Rep. 161; Story on Promissory Notes, secs. 230, 286; 1 Daniel on Negotiable Instruments, 580. See also *Salisbury* v. *Bartleson*, 39 Minn. 365, where some exceptions to the general rule are mentioned.

It is also argued by appellants that the court erred in refusing to allow them to recover upon the debt represented by the Long and Glennon paper. The finding of the court was, that it was taken in payment of the account on which appellants base their third cause of action, and the testimony sustains the finding. The only witness who related the transaction (one of the appellant firm) admitted upon the trial that he purchased the paper from Ettelsohn, obtained the cash thereon by means of discounting, and, as directed by the latter, applied the proceeds in payment of this debt. The finding, justified, as it was, by the evidence, disposes of the contention that the debt was merely suspended pending the currency of the notes.

On July 2, 1888, Allen & Co. executed twenty-three promissory notes, payable to their own order, for the total sum of twenty-five thousand dollars. The makers were then in embarrassed circumstances, and had been investigated by the attorney for appellants just before that day. It was upon the suggestion of the attorney that these notes were made, with the understanding that on his return to Chicago he would recommend to appellants that they loan some money to Allen & Co. with which they could pay claims against them held by other creditors, who were urging payment. These notes were sent to Ettelsohn, who called upon appellants for the purpose of completing the loan, which was to be advised by the attorney. The latter was called upon, produced a statement of the assets and liabilities of Allen & Co., reported what he had learned of the situation, and stated his conversations at St. Paul with Allen and Ettelsohn in reference to the loan. Appellants consented to make the loan. The notes were indorsed by Ettelsohn individually, and for his firm, and thereupon delivered to appellants, who applied and credited the

amount of the same to Allen & Co.'s account, which included an item of $7,000 cash, then paid Ettelsohn, to be used to pay other firm creditors, two notes of Ettelsohn,—one for $795.24, with interest thereon, $11.66,—and notes of one Ginsberg, payable to appellants, but indorsed by Ettelsohn, aggregating the sum of $2,733.46. Allen & Co. were in no way concerned in the note of Ettelsohn for $795.24, besides interest, or in the Ginsberg notes. These were matters in which Ettelsohn alone and individually was interested. The trial court deducted the sum of $3,540.36 from the amount found to be due appellants on these notes, upon the ground that the application of that sum to the taking up and cancellation of Ettelsohn's individual note and to the Ginsberg paper was unauthorized, and without justification. The conclusion that Allen & Co. could not be held in the amount of these obligations was undoubtedly correct. Appellants had knowledge that the firm was in financial distress. Their attorney, sent specially to investigate their condition, suggested the making of the notes for twenty-five thousand dollars for a specified purpose, and as a way out of the difficulty. This suggestion was acted upon by the active members of the firm at St. Paul, and the notes transmitted to Ettelsohn at Chicago that he might carry out the purpose, which was to adjust an open account held against the makers by appellants, and to take up a note made by Ettelsohn for a firm debt, to obtain ready money with which to meet the demands of other persons against the firm. Of the object for which this paper was made and sent to Ettelsohn appellants were advised at the time it was presented to and accepted by them, and their appropriation of any part to the cancellation of Ettelsohn's private debts or liabilities was wholly indefensible. Even conceding that Ettelsohn was a general partner as to appellants, he could not, without the consent, express or implied, of the other members of the firm, use the funds or the property of the firm to pay or settle or cancel his individual liabilities; and a creditor receiving such funds or property, having knowledge that they were misappropriated, as did appellants, could not retain the same. Further, the burden would be on him to show consent of the other partners: *Bank of Commerce* v. *Selden*, 3 Minn. 99 (155); *Davis* v. *Smith*, 27 Minn. 390; *Hinds* v. *Backus*, 45 Minn. 170. In this instance it was obvious that Ettelsohn's partners had no knowledge of the manner in which he acted.

This is not a case where one of a firm has been intrusted with the negotiable paper of the firm, and such paper has passed into the hands of a *bona fide* holder for value, and before maturity, as appellants' counsel appears to think.

It is further argued that the defense relied upon as to this cause of action was not within the pleadings. The answer averred a want of consideration for these notes; and to the extent of the amount disallowed by the trial court (the amount of the larger Ettelsohn note and the Ginsberg notes), Allen & Co. received no consideration. Hence the defense established was exactly within the issues. But if this were not the case, all of the testimony relative to this point was received without objection.

Judgment affirmed.

NEGOTIABLE INSTRUMENTS — INDORSEMENT — PAROL TESTIMONY. — As to when parol testimony may be admitted to vary the effect of an indorsement upon a negotiable instrument: Note to *Kulenkamp* v. *Groff*, 15 Am. St. Rep. 288; *Adrian* v. *McCaskill*, 103 N. C. 181; 14 Am. St. Rep. 788, and note. Compare note to *Jenkins* v. *Bass*, 21 Am. St. Rep. 348. Under the Georgia code, blank indorsements upon negotiable instruments may be explained by parol testimony between the parties and those who take with notice: *Eppens* v. *Forbes*, 82 Ga. 748.

NEGOTIABLE INSTRUMENTS — EXCUSE FOR DEMAND — MAKER'S INSOLVENCY. — The maker's insolvency, though known to an indorser, does not excuse the holder of a note from demand and notice: *Sandford* v. *Dillaway*, 10 Mass. 52; 6 Am. Dec. 99; *Crossen* v. *Hutchinson*, 9 Mass. 205; 6 Am. Dec. 55, and note; *Page* v. *Loud*, Harp. 269; 18 Am. Dec. 650.

PARTNERSHIP — USE OF PARTNERSHIP FUNDS BY PARTNER TO PAY INDIVIDUAL DEBTS. — One partner cannot appropriate partnership funds to pay his individual debts, without the consent of his copartners: *Janney* v. *Springer*, 78 Iowa, 617; 16 Am. St. Rep. 460, and note; *Davies* v. *Atkinson*, 124 Ill. 474; 7 Am. St. Rep. 373, and note 377–380; *Towle* v. *Dunham*, 76 Mich. 251; *Towle* v. *Dunham*, 84 Mich. 268; *Hartness* v. *Wallace*, 106 N. C. 427; or by express agreement to that effect between the partners: *Randall* v. *Hunter*, 76 Cal. 255; *Ringo* v. *Wing*, 49 Ark. 457. Where one partner disposes of firm assets in payment of his individual debt, it is a misapplication of them, and the person receiving them with notice of the misapplication is not a *bona fide* purchaser: *Clarke* v. *Farrell*, 80 Ga. 622; and the burden is upon him to show that the transaction was made with the knowledge and consent of the other partners: *National State C. Bank* v. *Noyes*, 62 N. H. 35. The other partners may, by their acts and conduct, estop themselves to deny consent to such a transaction: *McGhees* v. *McCutchen*, 82 Ga. 788.

OLSON *v.* ST. PAUL AND DULUTH RAILROAD CO.

[45 MINNESOTA, 536.]

COMMON CARRIERS — BOARDING MOVING TRAIN WITH SANCTION OF CONDUCTOR. — When a passenger having charge of live-stock in a car attempts to enter it with the consent of the conductor, and upon his assurance that it is safe to do so before the train moves, and is injured by the sudden starting of the train with a jerk while in the act of entering the car, the company is liable.

PRACTICE. — Where the lower court has not abused its discretion in refusing a new trial on the ground of excessive damages, the judgment will not be disturbed.

William H. Bliss and J. N. Castle, for the appellant.

Arctander and Arctander, and Fayette Marsh, for the respondent.

VANDERBURGH, J. The plaintiff's foot was caught and injured between the bumpers of freight-cars while climbing into one containing live-stock which he claims was under his charge, through the alleged negligence of the defendant, in the sudden and unexpected movement of the train without any signal or notice. The stock, including horses and cattle, belonged to one Newhaus, and was being transported in two cars from Appleton, on the Manitoba road, to Hinckley, on the defendant's road, and from that station to Duluth by the defendant company. The plaintiff's testimony tended to show that he assisted Newhaus in loading his stock, and that afterwards he went on board one of these cars at the request of Newhaus, to accompany and help care for the stock, and continued to occupy the same car until he was hurt. After passing Hinckley, he was in the car where the horses were with no other attendant, and was noticed by the conductor of the train, and in response to an inquiry of the latter, informed him that he was there in charge of the horses. The conductor, however, demanded his ticket, and notified him that he must either get out of the car or pay his fare. Plaintiff then handed five dollars to the conductor, who received it, and promised to get and return him the change. They were then at Finlayson, where the accident subsequently occurred, and where the conductor informed the plaintiff that the train would remain an hour or more. Plaintiff thereupon left the train for a drink of water, as he says, and soon after, observing that one of the horses was loose in the car, biting and teasing the others, he started back for the purpose of climbing

into the car again in order to secure the horse, when he met the conductor in charge of the train, and informed him that the horse had got loose again in the car, and inquired of him if it would be safe to go in there and tie him up, to which the conductor replied: "Yes; you are perfectly safe, for the train is not going to stir before the passenger comes up." Relying on this assurance, as he says, he went between the cars, climbed up over the couplings, slid back the door, the only means of ingress, and was in the act of entering when the train started with a sudden jerk, and he fell back between the cars, and his foot was caught and crushed between the bumpers. The foregoing is, substantially, the case as presented by the plaintiff's evidence. There is a sharp conflict between the testimony of the plaintiff and the conductor, who denies that he either expressly or impliedly consented to the plaintiff's riding in or returning to the stock-car, or that he had any conversation with plaintiff in respect to the movement of the train. There is a conflict also between the witnesses as to whether the train was standing on the side or main track. One of the defendant's witnesses testified that one of the horses was loose, as sworn to by the plaintiff, and one also agreed with him as to the location of the train on the side-track at the time of the accident. But this is important only as affecting the credibility of the witnesses. The leading questions of fact, whether the plaintiff was charged with any duty in looking after the stock in the car, and was permitted to return to the car for the purpose of hitching the horse, and especially whether the statements that he would be safe in doing so, and that the train would not move, were made, were questions to be determined by the jury, and this court will not interfere with the discretion and determination of the trial court in refusing a new trial thereon. The conductor had control of the movements of the train, and so far represented the company. The plaintiff was entitled to rely upon his assurance that it would not be moved, and that it would be safe for plaintiff to visit the car, and the company was bound by his acts and statements in reference to it. If the testimony of the plaintiff is true in respect to his obligation to care for the stock, and they required attention, it was proper for him to enter the car for that purpose, with the knowledge and consent of the conductor, who must have known the situation of the door of the car; and if the train was not to be moved for a considerable time, we are unable to see that there was

anything in plaintiff's conduct in visiting the car which conclusively establishes contributory negligence on his part. It was, at least, a question for the jury. Whether the rules of the company allowed drovers or their servants to ride in stock-cars to watch and care for stock, or not, is not, we think, material under the issues as presented by the evidence in this case. There is no presumption against the authority of the conductor to allow them to visit the car and look after their stock while stopping at a station; and there is no evidence of any rule limiting his authority. We think the evidence in plaintiff's behalf made a case for the jury: *Wright* v. *London etc. R'y Co.*, 1 Q. B. Div. 252, 257; *Fowler* v. *Baltimore etc. R. R. Co.*, 18 W. Va. 579, 584; *Pool* v. *Chicago etc. R'y Co.*, 53 Wis. 657; *Jacobus* v. *St. Paul etc. R'y Co.*, 20 Minn. 110 (125, 134).

2. The trial court also considered the question of excessive damages, and was of the opinion that the amount fixed by the jury, though the verdict was large, was not so far disproportionate to the nature and extent of the injury suffered as to warrant it in setting aside the verdict. We esteem the judgment a large one, and if the trial court had been of the opinion, from its impressions of the case upon the evidence, that the verdict ought to have been set aside, this court would not have interfered. But there was no abuse of discretion in refusing a new trial on that ground. In support of the verdict, the evidence on the part of the plaintiff tended to show, among other things, that the foot was amputated near the ankle, but so as to save the heel. At the time of the trial, more than a year and a half after the injury, there was a running sore on the "stump" of the amputated limb, and he had endured great pain and suffering, which continued up to the time of the trial. He was crippled for life, and his limb, which was exhibited to the jury, was liable to continue to cause him suffering in the future. He was forty-five years of age, and had been a carpenter, and able, previously, to earn good wages. Evidence of these and other facts testified to was before the jury. It is a case from the nature of which the trial court was in much better position to judge of the question than an appellate court could be. Each case must stand largely upon its own facts, and the question is one peculiarly for the jury: *Ferguson* v. *Wisconsin Cent. R. R. Co.*, 63 Wis. 145; *Berg* v. *Chicago etc. R'y Co.*, 50 Wis. 419, 428.

Order affirmed.

COMMON CARRIERS — MOUNTING AND DISMOUNTING FROM A MOVING TRAIN. — As to the rights of parties injured in mounting and dismounting from moving train, see extended note to *Commonwealth* v. *Boston etc. R. R. Co.*, 37 Am. Rep. 384–387; note to *Walker* v. *Vicksburg etc. R. R. Co.*, 17 Am. St. Rep. 422–429; note to *Ingals* v. *Bills*, 43 Am. Dec. 355–367. It is negligent and unwarrantable conduct on the part of the conductor of a train to advise a passenger to leave a moving train, or to leave in such a way as would expose him to danger: *Jones* v. *Chicago etc. R'y Co.*, 42 Minn. 183; *Adams* v. *Missouri etc. R'y Co.*, 109 Mo. 555.

CASES

IN THE

SUPREME COURT

OF

MISSOURI.

HAHLO *v.* MAYER.

[102 MISSOURI, 92.]

PARTNERSHIP — LIABILITY OF ONE HELD OUT TO BE PARTNER. — One not in fact a partner cannot be made liable to third persons on the ground of having been held out as a partner, except when such holding out is done by him or by his consent, and was known to the person seeking to avail himself of it at the time that the contract was made. In such case, the liability rests on the principle of equitable estoppel.

Hugo Muench and F. A. Cline, for the appellants.

Albert Arnstein, for the respondent.

BRACE, J. This is an action against Abraham B. Mayer and Frederick Mayer as partners under the firm name of A. B. Mayer and Son, on two negotiable promissory notes, one for fifteen hundred dollars, dated September 4, 1884, the other for one thousand dollars, dated September 6, 1884, each payable to J. R. Wallach and Brother six months after date, and signed A. B. Mayer and Son. Abraham B. Mayer answered, under oath, denying the execution of the notes and the alleged partnership. Frederick answered, admitting that he executed the notes; avers that they were executed by him without consideration, for the accommodation of the said J. R. Wallach and Brother, and without the knowledge of his co-defendant, the said Abraham; and denies the alleged partnership between him and the said Abraham. There was a verdict and judgment for the plaintiff for the amount of the notes, interest, damages, and costs, against both defendants, and they appeal.

The evidence tended to prove that the notes were executed

by Frederick Mayer, without any consideration, for the accommodation of the payees, J. R. Wallach & Co., and by them negotiated, and that the plaintiff acquired them for value before maturity, and that they were so executed and negotiated without the knowledge of the said Abraham. The main question in the case was, Were the said defendants, at the time the notes were executed, partners? and if not partners in fact, did the said Abraham so hold out the said Frederick as his partner, as that he is estopped from denying that he was a partner in an action upon the negotiable promissory notes executed by the said Frederick in said firm name, brought by the holder thereof, who acquired the same for value before maturity?

Upon the second proposition the court gave the following instructions (we quote only so much of them as bears upon the proposition):—

"2. The court instructs the jury that if they find from the evidence that at the time the notes in controversy were executed, and were received by plaintiff, the business of A. B. Mayer was conducted under the name of A. B. Mayer and Son, and that said A. B. Mayer knew such to be the fact, and acquiesced therein, then said A. B. Mayer is liable on the notes in suit, even though the jury finds that there was in fact no actual partnership then existing between said A. B. Mayer and his son Frederick.

"3. The court instructs the jury that the presumption of law is, that a party to whom a negotiable note is transferred takes it upon the faith of the persons whose names appear upon it as makers; therefore if the jury find from the evidence that A. B. Mayer knew that his son Frederick was using the name of the firm of A. B. Mayer and Son in the business of said A. B. Mayer, and said A. B. Mayer acquiesced therein, then plaintiff had a right to rely on the signatures on said notes as being the signature of A. B. Mayer and of his son Frederick, and the jury will find against both defendants, even though they find that the defendant Frederick had no express authority to sign the name of A. B. Mayer and Son to the notes."

The name that appeared upon the face of the notes sued upon as maker was A. B. Mayer and Son. The plaintiff took the note upon the faith of that firm; he has a right to look for payment of his note to every individual who was a member of that firm at the time the note was executed; he has the

further right to look for payment to every individual who, when he acquired the notes, was holding himself out to him as a member of that firm, whether he was in fact a member of that firm or not. If the instructions had been confined within these limitations, they would have been unobjectionable; but they go further, and declare that the defendant Abraham B. Mayer is liable as a member of the firm of A. B. Mayer and Son, although in point of fact he was not a member of such concern, if, at the time of the execution of the notes sued on he was holding himself out to the world as a member of the firm of A. B. Mayer and Son, whether the plaintiff knew of such holding out to the public or not.

While this proposition may be said to have had the sanction of respectable authority (*Young* v. *Axtell*, cited in *Waugh* v. *Carver*, 2 H. Black. 242; *Poillon* v. *Secor*, 61 N. Y. 456; *Smith* v. *Hill*, 45 Vt. 90; 12 Am. Rep. 189; *Rizer* v. *James*, 26 Kan. 221), it has not been able to stand the test of critical judicial inquiry, which has in vain sought for a principle upon which it could stand. The great weight of modern authority is against it. The only conceivable ground upon which one can be charged as a partner by one who contracts for him and in his name as a partner without his authority, and when in fact he was not a partner, is upon the ground of estoppel. The supreme court of the United States in *Thompson* v. *First Nat. Bank of Toledo*, 111 U. S. 529, considered this question very fully, and, after a thorough review of the authorities, held that a person not in fact a partner could not be made liable to third persons on the ground of having been held out as a partner, except upon the principle of equitable estoppel, and approved the following summing up of the law on this subject by Mr. Justice Lindley, in his treatise on the law of partnership: "That no person can be fixed with liability on the ground that he has been held out as a partner, unless two things concur, viz.: 1. The alleged act of holding out must have been done by him or by his consent; and 2. It must have been known to the person seeking to avail himself of it. In the absence of the first of these requisites, whatever may have been done cannot be imputed to the person sought to be made liable; and in the absence of the second, the person seeking to make him liable has not in any way been misled": Lindley on Partnership, 2d Am. ed., 43.

The court cites many authorities which, on examination, will be found to sustain this position, to which others might

be added if it were necessary. The doctrine thus announced has been expressly recognized and approved in this state in the cases of *Rimel* v. *Hayes*, 83 Mo. 200, and in *Hannah* v. *Baylor*, 27 Mo. App. 302, while the earlier case of *Dowzelot* v. *Rawlings*, 58 Mo. 75, may be said to rest on the same principle. It is maintained by all the recent text-writers on the subject. In a work just published, reviewing many and citing nearly all the leading English and American cases on the subject, it is said liability by holding out "proceeds solely on the ground of estoppel," and "a person being liable as a partner, by holding out on the ground of estoppel solely, is, therefore, not liable to one who did not know of such holding out at the time of contracting. The holding out must antedate the contract, and the plaintiff's knowledge of and reliance on his alleged connection must be proved as of that time, for, otherwise, the plaintiff was not misled": 1 Bates on Partnerships, c. 5, secs. 90 et seq. The same doctrine is asserted by another author, whose valuable work has just come to hand (Parsons on Partnership, c. 3, sec. 69), the correctness of whose position is recognized by Mr. Bigelow in the last edition of his work on estoppel, fifth edition, page 565, note 1.

He who holds another out to be his partner holds himself out as the partner of such other person. There was evidence tending to prove that at St. Louis, where the defendant A. B. Mayer was engaged in business for some months previous to the execution and negotiation of these notes, he had been holding out to the public that his son Frederick was a partner of his under the firm name of A. B. Mayer and Son. The notes were negotiated in the city of New York, where the payee, Wallach & Co., for whose accommodation the son executed them, was doing business, and where the plaintiff acquired them. There was no evidence tending to prove that the plaintiff had any knowledge of any act of the defendant Abraham Mayer relied upon to show that he was holding out his son as a partner. The facts of the case presented simply a holding out to the public as a partner, and the court, as matter of law, declared in the instructions quoted that such holding out to the public was sufficient to render the defendant Abraham Mayer liable, although he was not a partner of his son, and the plaintiff may not have known, or had any reason to believe, that he had ever held out his son to be his partner. In this the court committed error for which the case must be reversed, and the cause remanded for new trial.

BARCLAY, J., dissented, on the ground that the firm in question being a mercantile trading partnership, the partners had the right to issue promissory notes, in the absence of any notice to holders thereof of limitation on such authority. The business was that of A. B. Mayer, under any view of the facts, and while he claims that it was his exclusively, and that his son was simply an employee, and not a partner, still, the notes were issued in the name of "A. B. Mayer and Son," which amounted "to a continuing representation to any holder not better informed that A. B. Mayer and some son of his composed the firm"; and if A. B. Mayer "knew that his son Frederick was using the name of A. B. Mayer and Son in the business, and assented to it, he should be held liable for the notes issued in the form indicated, when held by innocent parties, in the circumstances described."

PARTNERSHIP, LIABILITY OF ONE HELD OUT AS PARTNER. — The rule is well settled beyond all dispute that a person who, not being a partner in fact, suffers himself to be held out to the public or to individuals as a partner, thereby renders himself liable as a partner, to any one who, in ignorance of the real facts, has been misled or injured by contracting on the faith of his conduct: *Marble* v. *Lypes*, 82 Ala. 322; *Humes* v. *O'Bryan*, 74 Ala. 64; *Brugman* v. *McGuire*, 32 Ark. 733; *Campbell* v. *Hastings*, 29 Ark. 512; *Riser* v. *James*, 26 Kan. 221; *Hicks* v. *Cram*, 17 Vt. 449; *Allen* v. *Dunn*, 15 Me. 292; 33 Am. Dec. 614. The rule is equally true of one who represents himself as a partner. Thus where one represents himself to be a partner to one who gives credit upon the faith of the representation, he will be responsible as a partner, whether he is actually so or not: *Markham* v. *Jones*, 7 B. Mon. 456; *Poole* v. *Fisher*, 62 Ill. 181; *Kirk* v. *Hartman*, 63 Pa. St. 97; *Hicks* v. *Cram*, 17 Vt. 449; *Rice* v. *Barrett*, 116 Mass. 312; *Carmichael* v. *Greer*, 55 Ga. 116; *Reed* v. *Cremer*, 111 Pa. St. 482; 56 Am. Rep. 295; *Ripley* v. *Evans*, 22 Mo. 157; *Sun Ins. Co.* v. *Kountz Line*, 122 U. S. 583.

If two or more persons hold themselves out to the public as partners or joint traders, and conduct themselves as such, those dealing with them on the faith of their representations may hold them responsible as partners, no matter what was the agreement existing among themselves, and though there is no partnership in fact: *Cottrill* v. *Vanduzen*, 22 Vt. 511; *Smith* v. *Smith*, 27 N. H. 244; *Getchell* v. *Foster*, 106 Mass. 42; *Barnett Line of Steamers* v. *Blackmar*, 53 Ga. 98; *Pratt* v. *Langdon*, 97 Mass. 97; 93 Am. Dec. 61; *Walker* v. *Brown*, 66 Tex. 556; *Maxwell* v. *Gibbs*, 32 Iowa, 32; *Shafer* v. *Randolph*, 99 Pa. St. 250; *Partridge* v. *Kingman*, 130 Mass. 476.

The liability of one who, not being in fact a partner, represents himself as such, or suffers himself to be held out as such, rests upon the principle of estoppel, and the person seeking to enforce such liability must have acted in his dealings in reliance upon the existence of a partnership relation or responsibility: *Brown* v. *Grant*, 39 Minn. 404; *Walrath* v. *Viley*, 2 Bush, 478; *Cirkel* v. *Croswell*, 36 Minn. 323; *Maxwell* v. *Gibbs*, 32 Iowa, 32. In order to create such estoppel in favor of a creditor, and against the party representing himself to be a partner, or permitting himself to be so represented, it is absolutely necessary that the creditor was thereby led to believe him to be a partner, and to give credit to the supposed firm upon such belief, and these facts must appear in proof. This rule is supported by the cases heretofore cited, and by *Wood* v. *Pennell*, 51 Me. 52; *Cook* v. *Penrhyn Slate Co.*, 36 Ohio St. 135; 38 Am. Rep. 568; *Bowie* v. *Maddox*, 29 Ga. 285; 74 Am. Dec. 61; *Hefner* v. *Palmer*, 67 Ill. 161; *Marble* v. *Lypes*, 82 Ala. 322.

It follows, as a natural consequence, that there is no liability in favor of a person who had notice of the real facts, and was therefore not misled to his

prejudice: *Alabama Fertilizer Co.* v. *Reynolds*, 85 Ala. 19. A person who is not actually a partner, and who has no interest in the partnership, cannot, by reason of having held himself out to the public as a partner, be held liable as such on a contract made by the partnership with one who had no knowledge of the holding out: *Thompson* v. *First Nat. Bank*, 111 U. S. 529. Representations to one person that he is a partner will not make the party so representing himself, and who in fact is not a partner, responsible to a third person who has no knowledge of and did not rely upon such representations: *Markham* v. *Jones*, 7 B. Mon. 456. The only case that we have been able to discover directly at variance with this doctrine is that of *Poillon* v. *Secor*, 61 N. Y. 456, where it was decided that one permitting himself to be held out as a member of a partnership is liable as such to a subsequent creditor of the firm, although the creditor was ignorant of the arrangement, and did not give credit on the faith of his apparent connection with the firm. This case has met with severe criticism in many other cases, and especially in *Thompson* v. *First Nat. Bank*, 111 U. S. 529, and is, in effect, overruled by the subsequent New York cases of *Cassidy* v. *Hall*, 97 N. Y. 159, and *Rogers* v. *Murray*, 110 N. Y. 658, where *Thompson* v. *First Nat. Bank*, 111 U. S. 529, is expressly approved.

To invoke the doctrine of equitable estoppel against the person falsely held out as a partner, it must be made to appear that such holding out was done by him, or by his consent and with his knowledge, as well as that it was known to the party seeking to avail himself of it: *Seabury* v. *Bolles*, 51 N. J. L. 103; *Rogers* v. *Murray*, 110 N. Y. 658; *Kirk* v. *Hartman*, 63 Pa. St. 97; *Hicks* v. *Cram*, 17 Vt. 449; *Cole* v. *Butler*, 24 Mo. App. 76. The rule is thus laid down in *Denithorne* v. *Hook*, 112 Pa. St. 240: One cannot be fixed with liability as a partner on the ground that he has been held out as such, unless two things are shown: 1. That the alleged act of holding out was done by him, or with his consent; and 2. That it was known to the person seeking to avail himself of it. Consequently, one who has contracted, as pilot, with two persons engaged in running a steamboat cannot charge a third person as a partner who is not in fact such, and has never held himself out to the public as such, but who has done some acts from which it might be inferred that he was a partner, but of which the person contracting was ignorant, and did not contract with reference to his responsibility: *Wright* v. *Powell*, 8 Ala. 560.

The law on this subject, as well established by authority, is thus clearly stated in *Fletcher* v. *Pullen*, 70 Md. 205; 14 Am. St. Rep. 355: "The ground of liability of a person as partner who is not so in fact is, that he has held himself out to the world as such, or has permitted others to do so, and by reason thereof is estopped from denying that he is one, as against those who have in good faith dealt with the firm, or with him as a member of it. But it must appear that the person dealing with the firm believed, and had a reasonable right to believe, that the party he seeks to hold as a partner was a member of the firm, and that the credit was, to some extent, induced by this belief. It must also appear that the holding out was by the party sought to be charged, or by his authority, or with his knowledge or assent. This, where it is not the direct act of the party, may be inferred from circumstances, such as from advertisements, shop-bills, signs, or cards, and from various other acts from which it is reasonable to infer that the holding out was with his authority, knowledge, or assent; and whether a defendant has so held himself out, or permitted it to be done, is in every case a question of fact, and not one of law."

The only fault to be detected in the doctrine thus laid down is, that in one respect it states the rule too broadly in announcing that in order to incur liability the person sought to be charged must be held out to the "world" as a partner; for it is clear from the authorities that he is liable, under the circumstances mentioned, if he holds himself out, or knowingly permits himself to be held out, as a partner to any one person who is thereby induced, in ignorance of the real facts, and relying upon the information received and representations made, to extend credit to the party sought to be charged. Although a person may not in fact be a partner between himself and another, yet if, by his conduct, including acts and declarations, he holds himself out as a partner to third persons, he is bound to make good that character, to prevent fraud and deception upon them, and he will be held as a partner as to such person or persons: *Thomas* v. *Green*, 30 Md. 1. In such cases, and as to third parties, the liability of a partner is frequently imposed, though it was not the intention of the party sought to be charged to become one, and even though a partnership could not have been made: *Cleveland Paper Co.* v. *Courier Co.*, 67 Mich. 152. This action was against a corporation and a private person, and the defendants were held liable upon proof that they assumed to form a partnership, to whom the plaintiff sold goods, relying upon the liability of both vendees, who had the benefit of the goods, or the proceeds thereof, they being such as both defendants were using in their business, and for which they at one time had given their note. When a party permits another to hold him out as a partner, and thereby to procure credit on the strength of his supposed relation, neither community of interest nor participation in the profits is necessary to make him liable as a partner. In order to render a party liable on the ground that he has been held out as a partner, he must have had notice of being so held out, or there must be circumstances from which notice can be presumed: *In re Jewett*, 15 Bank. Reg. 126; 7 Biss. 328. To constitute one a partner as to third persons, it is only necessary that he should hold himself out as such to third persons trusting the partnership, and it is not necessary that he should in fact be interested in the profits and losses: *Carmichael* v. *Greer*, 55 Ga. 116.

In order to bind persons as partners, it is not necessary to prove a partnership between them. It need only be shown that they held themselves out as partners: *Gates* v. *Watson*, 54 Mo. 585. Hence it follows that if two persons are connected in business for a certain purpose, and in such a way as not to constitute them strictly partners between themselves, still, they may make themselves partners as to third persons from the manner in which they transact such business: *Town* v. *Hendee*, 27 Vt. 258. It is sufficient to bind a person not in fact a partner that he has so acted and conducted himself towards the public as to induce a reasonable person to deal with him in the honest belief that a partnership existed: *Rimel* v. *Hayes*, 83 Mo. 200. Such conduct may be by means of words spoken or written, or by conduct leading to the belief that the person sought to be charged is a partner: *Cirkel* v. *Croswell*, 36 Minn. 323.

One who holds out to another person a third party as his partner is liable to such person for debts contracted by the supposed partner in the course of the legitimate business of the supposed firm, after the acts which induced the belief of the existence of the partnership: *Grabenheimer* v. *Rindskoff*, 64 Tex. 49. So where two persons authorize a third to represent and hold them out as partners with him, and in pursuance thereof he does so, this is as much a holding themselves out as partners as if the same representations had been made by them in person: *Hinman* v. *Littell*, 23 Mich. 484.

One who participates in negotiations for a contract of sale, holding himself out as a partner in the ownership of the property, is estopped from denying the partnership, as against the purchaser: *Sherrod* v. *Langdon*, 21 Iowa, 518. And where two parties agree to carry on a business for their mutual benefit, one to furnish the money, the other to perform certain services, and to divide the profits arising from such business, they thereby become liable as partners to third persons trusting in their representations, although no partnership in fact was contemplated by the parties themselves: *Rowland* v. *Long*, 45 Md. 439. So an agreement between one partner and a third person that the latter shall participate in that partner's share of the profits of the firm, as profits, renders him liable as a partner to the firm creditors, although as to the other members of the firm he is not a partner: *Fitch* v. *Harrington*, 13 Gray, 468; 74 Am. Dec. 641.

Any private agreement between partners, or limitation placed upon the authority of a partner by whom the business is conducted, is of no avail against a creditor who has contracted in ignorance of it. The burden of showing notice or knowledge of such agreement or limitation is on the partner who disputes his liability on a contract within the scope of the partnership: *Humes* v. *O'Bryan*, 74 Ala. 64. If parties represent themselves as partners, or each permits the other to so represent them, no agreement *inter se* will exonerate any one of them from the joint liability on contracts in the partnership name or character: *Craig* v. *Alverson*, 6 J. J. Marsh. 609. As to what facts will or will not constitute a holding out so as to constitute a party a partner as to third persons, it may be said that where a firm composed of two women puts the husband of one in absolute control of the business, and he thereafter makes purchases on his own credit, and with his wife's knowledge and consent acts in all respects as if he, and not his wife, were one of the partners, he will be held as a partner as to creditors who have no notice to the contrary; and his statements to a creditor that he is a partner are admissible in defense to an action of trover for goods taken on attachment, and unless superior equities have arisen, a judgment against the firm concludes the other partner: *Parshall* v. *Fisher*, 43 Mich. 529. Conceding that a married woman who holds herself out as a member of a commercial partnership is liable for firm debts when not in fact a partner, still, if on hearing that the firm is using her name she forbids it, and does not hear that her prohibition is violated, she is not estopped to deny that she is a partner: *Rittenhouse* v. *Leigh*, 57 Miss. 697.

Where one Harrington gave a note signed "Hill & Co.," "by Harrington," in the absence of such a firm, or of any partnership between them, and in the face of the fact that prior to the giving of the note Hill was informed that Harrington was using his name, and had told him that he must not use that name so as to injure him, to which Harrington assented, but subsequently gave the note without Hill's knowledge, or the knowledge of the payee, of the previous use of the names, it was decided that Hill was liable on the note: *Smith* v. *Hill*, 45 Vt. 90; 12 Am. Rep. 189. When a partnership is formed and carried on by two married women, each owning a separate estate, their husbands acting as general agents for them in conducting the business, the latter may also render themselves liable as partners to persons who deal with them in ignorance of the real facts: *Rabbitte* v. *Orr*, 83 Ala. 185. Where several persons put up a building, representing themselves as partners, and one of them buys brick for that purpose, without an express understanding with the seller that it is an individual purchase, and the brick is used in the building, such persons are liable as partners for its value: *Stocker*

v. *Smith*, 46 Mich. 14. Where, however, B. and C. contracted to build a house, and then agreed between themselves that each should do certain distinct portions of the work for a certain portion of the contract price, this did not, of itself, constitute a partnership between them; and in the absence of extrinsic evidence of such partnership, or that the parties held themselves out as partners, and were dealt with as such by a creditor, who extended credit to C. with the belief that B. was jointly liable, the latter will not be held responsible as a partner: *Herbert* v. *Callahan*, 35 Mo. App. 498. Where one furnishes money to another to conduct a business, the latter to let the former have goods at cost, without any agreement as to interest, profits, or losses, this will not constitute the parties partners; but if one of them represents to a third party that he is a partner of the other, and such other acquiesces in such representations, by silence or otherwise, when made known to him, he will be liable as a partner to such third person from the date of the representations or the first credit given thereunder: *Slade* v. *Paschal*, 67 Ga. 541. Two firms may, by their course of dealing with a third party, as by engaging in a similar business and holding out the idea that they constitute but one firm, incur, as to him, a joint liability, to the same extent as if they did in fact constitute but one partnership: *Beall* v. *Lowndes*, 4 S. C. 258; *Eye* v. *Tasker*, 77 Iowa, 48. In such cases, however, the creditor must have contracted in the belief that both firms in fact constituted one firm, and if he relied exclusively upon the credit of one firm, he cannot hold them both liable: *Hastings Nat. Bank* v. *Hibbard*, 48 Mich. 452. The question whether or not one has held himself out as a partner, or permitted himself to be so held out, to the injury of a third person, is a question of fact for the jury to determine: *Seabury* v. *Bolles*, 51 N. J. L. 103; *Brown* v. *Watson*, 72 Tex. 216; *Fletcher* v. *Pullen*, 70 Md. 205; 14 Am. St. Rep. 355.

As to what is proper evidence to establish the fact of a holding out, it may be said that evidence that persons held themselves out as partners in the transaction of their business is sufficient, *prima facie*, to bind them as such: *McCarthy* v. *Nash*, 14 Minn. 127. This fact may be established as well by circumstances, declarations, and conduct, as by direct proof: *Rogers* v. *Murray*, 110 N. Y. 658. And although it cannot be established by general reputation, it may be established by admissions, declarations, or acts of the party sought to be charged, or by circumstantial evidence which has induced the belief of an existing partnership: *Bowen* v. *Rutherford*, 60 Ill. 41; 14 Am. Rep. 25; *Seabury* v. *Bolles*, 51 N. J. L. 103; *Cornhauser* v. *Roberts*, 75 Wis. 554–556; *Brown* v. *Watson*, 72 Tex. 216. In *Benjamin* v. *Covert*, 47 Wis. 375, 384, it was said: "We are inclined to hold, both upon principle and authority, that general reputation is not admissible to prove the fact of partnership, nor as corroborative of other evidence to prove such fact. But a person who is not in fact a partner may, by holding himself out as such, render himself liable to parties who deal with the firm on the presumption that the fact exists which his acts tend to evidence. It may be that general reputation in the community in which he resides that he is a member of a firm doing business there, especially when such reputation is created by the acts and declarations of the party himself, or even if he have knowledge of such reputation, and permit it to exist without any contradiction on his part, may be given in evidence in favor of one who has acted upon the fact that such reputation existed, and given credit to the firm on account thereof."

Of course, as we have shown in the beginning of this note, one who is not in fact a copartner is not estopped to deny that his name was so used as to lead others to suppose that he was a copartner, unless it is shown that such

use of his name was made with his knowledge and was also known to the creditor. Consequently, the acts and declarations of a person not a partner are not admissible to charge him as a partner, without showing that they were known to the creditor before he extended the credit: *Fitch* v. *Harrington*, 13 Gray, 468. So a contract by two parties to perform a particular piece of work is not, in itself, a contract of partnership *inter se*, nor is such contract competent evidence to fix the liability of one as a partner, unaccompanied by evidence that the creditor knew of its existence and gave credit upon the faith of it: *Denithorne* v. *Hook*, 112 Pa. St. 240. And where a creditor seeks to charge one as the partner of another on the ground that he has held himself out to the public as such, only such acts and declarations of his as came to the knowledge of the creditor before he dealt with him are admissible in evidence: *Rimel* v. *Hayes*, 83 Mo. 200. The admissions and declarations of one member of an alleged firm, in the absence of the others, are not admissible, as against them, to prove the partnership. The partnership must be proved, before such admissions are competent. Nor are the reports of a commercial agency admissible to prove a partnership, unless knowledge or means of knowing of them is brought home to the party sought to be charged. And so the acts and declarations of an alleged partner are inadmissible to establish the partnership, as against another not shown to have knowledge of or means of knowing them, or of contradicting them. And so evidence of general reputation is not competent to establish a partnership as against one who was absent from the country and ignorant of such reputation: *Campbell* v. *Hastings*, 29 Ark. 512. In *Carmichael* v. *Greer*, 55 Ga. 116, it was decided that when the question is as to the liability of an alleged partner growing out of credit given on the faith of representations made by him that he was a member of the firm, evidence that another member of the firm, in the absence of the former, and without his consent, used and signed the firm name in other transactions, is admissible. Where it is sought to bind one as the partner of another, it is proper for the jury to consider evidence to the effect that the latter introduced the former to the creditor's officers as his partner, and that the one so introduced was silent, and himself at another time stated to the same officers that he and such other party were partners: *Town of Manson* v. *Ware*, 63 Iowa, 345. And proof of information from a third person that one is held out as a partner, communicated to the creditor, is admissible to show his notice and knowledge at the time of contracting, and is not objectionable as being hearsay: *Brown* v. *Grant*, 39 Minn. 404. But the declarations of one of several persons who contemplate the formation of a partnership, made without the knowledge or consent of the others that such partnership had been formed, will not bind such others, nor estop them from proving the non-existence of the partnership: *Brown* v. *Watson*, 72 Tex. 216.

The burden of proof seems to be on the party seeking to charge one with liability as being a partner: *Lieb* v. *Craddock*, 87 Ky. 525. And the party sought to be charged as a partner may show in defense that he refused to pay for advertisements of the alleged partnership, on the ground that he was not a partner; that he returned, unopened, mail matter addressed to such firm, stating that he had nothing to do therewith, and was not a partner; and he may also show that he has successfully resisted a suit seeking to charge him as such partner, and that a lease between him and the other party merely created the relation of landlord and tenant, and not a partnership.

A person knowing that he is held out as a partner is chargeable as such,

unless he does all that a reasonable man should, under similar circumstances, to assert and manifest his refusal, and thereby prevent innocent parties from being misled; and whether he has done this or not is for the jury to determine. It may infer that he has been held out as a partner with his knowledge and assent from the fact that he knew that his name was signed with that of the other person to an advertisement of their business, without any published denial of the same; and evidence of this fact is admissible, though the creditor never saw the advertisements, but trusted the firm in good faith and upon good grounds: *Fletcher* v. *Pullen*, 70 Md. 205; 14 Am. St. Rep. 355.

A statement by the party sought to be charged that he was going into a certain building, and the fact that he occupied a portion thereof in the auction business, and that he sold tickets for another person's opera-house in the same building, acted as treasurer, and had his name printed on the bills as such, are not sufficient to prove him a partner in the opera-house, in the absence of representations to that effect: *Parker* v. *Fergus*, 43 Ill. 437. And the fact that a clerk, agent, or salesman of a partnership uses the firm name in transacting its business, without disclosing that he is not a member thereof, will not make him liable as a partner to those with whom he has dealt, in the absence of other evidence that he held himself out as such: *Ihmsen* v. *Lathrop*, 104 Pa. St. 365.

A retiring partner who has failed to bring notice of the dissolution of the partnership home to creditors, or who has thereafter permitted himself to be held out as a partner, may still be held liable as such to such creditors as have extended credit to the firm in the belief and on the faith of the fact that such retiring partner was still a member of the firm. Thus a retiring partner who gave notice by publication in a newspaper that he had ceased to be a partner, but who subsequently allowed his name to appear in the firm as a partner, and continued in its employ, is liable as a partner to one who dealt with the firm, and was misled by appearances, having no notice that he was not a partner, although the fact was generally known at a place where the contract was made: *Wait* v. *Brewster*, 31 Vt. 516. Where a partnership consisted of father and son, under the firm name of H., S., & Co., and H. S., being the father, and giving the firm its credit, sold his interest to his partner and another son, who, by agreement with the father, continued the business under the name of H., S., & Co., the father, by allowing his name to be so used, holds himself out as a member of the new firm, and is thereby estopped from denying the fact, as against a creditor who has trusted the new firm on the faith that he was a member of the firm, although publication has been made of the fact of dissolution of the old firm and of the formation of the new one, of which fact, however, the creditor had no notice: *Speer* v. *Bishop*, 24 Ohio St. 598. If, in an action to charge two as partners, the creditor shows the existence of a partnership between them at one time, and that no notice of dissolution has ever been given, he may then show that at the time he extended credit the partnership was generally reputed to continue, and that the credit was given to the partnership in the firm name, though subsequently to the dissolution in fact; and it is then for the jury to determine whether or not the retiring partner has acted in such manner since the dissolution as to hold himself out as a partner so as to render him liable as such: *Benjamin* v. *Covert*, 47 Wis. 375.

Even after the retirement of a partner from the firm he is liable upon contracts made by the remaining members with such creditors as dealt with the firm before his retirement, and have no notice thereof. In order to bind

him, such creditors need not have given credit to the firm on the faith that he was a member thereof; for it is sufficient if they, without notice of his retirement, still believed him to be a member of the firm: *Lieb* v. *Craddock*, 87 Ky. 525; note to *Prentiss* v. *Sinclair*, 26 Am. Dec. 292.

CITY OF ST. LOUIS *v.* DAVIDSON.

[102 MISSOURI, 149.]

MUNICIPAL CORPORATION — CONTRACT ULTRA VIRES — LEGALITY OF. — A contract made by a municipal corporation, although *ultra vires*, is not illegal if not prohibited by its charter.

MUNICIPAL CORPORATION — CONTRACT ULTRA VIRES — ESTOPPEL. — A contract made by a city for the services of prisoners in its work-house to a private person, although *ultra vires*, is not illegal if not prohibited by its charter; and while it may successfully interpose the plea of *ultra vires* when sued upon such contract, the party contracting with it cannot set up such plea to escape liability under the contract.

MUNICIPAL CORPORATION — CONTRACT ULTRA VIRES — ESTOPPEL. — A party contracting with a city under a contract which is *ultra vires*, but not prohibited, is estopped, when sued upon the contract, from setting up the plea of *ultra vires* to escape liability and to enable him to retain benefits received under the contract.

Smith P. Galt and Andrew M. Sullivan, for the appellants.

Leverett Bell, for the respondent.

SHERWOOD, J. Action on bond for two thousand dollars, given by Davidson to the city to secure the performance of a contract on his part, which contract was made with the city and purported to confer power on Davidson to work the prisoners in the work-house, at so much per head per day. After working the prisoners for some months under this contract, Davidson abandoned it, and this action is brought to recover from him and his sureties the amount due the city for labor of prisoners thus employed and not paid for.

The separate answers of defendants were identical in terms, and set up the defense that the alleged contract was illegal and void as against public policy; that it was void because the city has no power or authority to make the same, and therefore they were not liable thereon.

The case was tried by the court sitting as a jury, and a special verdict was rendered, upon evidence tending to support it, as follows: For services actually rendered and unpaid for, by female prisoners at the rate of twenty cents per day, and male prisoners at sixty-five cents per day, with interest,

$432.10; for drawing holes in brushes at ten cents per one thousand, with interest, $620.64; making a total verdict of $1,052.74.

The court refused to give defendants' declaration that under the law and the evidence in the case the plaintiff could not recover, but gave a declaration of law of its own motion, which was, in substance, that the city had no power to make said contract, and that it was void; that the plaintiff was not entitled to recover any of the penalties provided therein for failure to employ prisoners; but that it was entitled to recover for the work actually done by the prisoners, and not paid for by Davidson; that as to such work the defendants were estopped to deny the validity of the contract. Defendants' motion for a new trial having been overruled, the case comes here by appeal.

Paragraph 10 of section 26, article 3, of the city charter, so far as necessary to quote it, is as follows: "Every person so committed to the work-house, or such other place aforesaid, shall be required to work for the city at such labor as his or her health and strength will permit, within or without said work-house, or other place, not exceeding ten hours each working-day; and for such work the person so employed shall be allowed, exclusive of his or her board, fifty cents per day for each day's work, on account of said fine and costs."

At the time Davidson made the contract aforesaid, the city had passed ordinance 47, section 1763 of which authorized a contract of the kind made in the case at bar.

Was the city entitled to recover for the work actually done by the prisoners, and not paid for by Davidson? and was the latter estopped to deny the validity of the contract?—are the questions arising on this record.

It will have been observed that the charter of the city, while it does not permit, yet does not prohibit, the making of such a contract as the one before us, so that although the contract is *ultra vires* the corporation, yet it is not illegal, because not prohibited by the charter. This is a distinction clearly marked out by the authorities: 2 Dillon on Municipal Corporations, 4th ed., sec. 936; *McDonald* v. *Mayor*, 68 N. Y. 23; 23 Am. Rep. 144; Bigelow on Estoppel, 5th ed., 685.

And though a city might successfully interpose the plea of *ultra vires* when sued upon a contract, yet it does not thence follow that a party who contracted with such city can, when sued on the contract, successfully interpose the plea of inca-

pacity on the part of the city to make such a contract, such contract not being illegal in the sense already indicated.

In instances of this kind, the plea of legal disability of the opposite contracting party is as much out of the power of a defendant to make as would be a plea of the minority of the other party in similar circumstances,—something of which no one can take advantage himself, except the party making it: Bigelow on Estoppel, 5th ed., 465; *Oregonian R'y Co.* v. *Oregon R'y & Nav. Co.*, 10 Saw. 464.

But upon a yet broader ground the defense set up in the answers cannot be maintained; the contract was not prohibited by law. The principal in that contract has derived benefits under it; he cannot retain those benefits and repudiate the source from which they spring by denying the validity of the contract in which they originated. In short, he is estopped to grasp the benefits of that contract with one eager hand, while thrusting aside its burdens with the other.

The principle here asserted is one promotive of fair dealing, which is the basis of estoppels, and it is good law, as is exemplified by many adjudications. Thus where the common council of the city of Hoboken, without any legal authority, created the office of collector of assessments for street improvements, and appointed Harrison as such collector, who executed his official bond as such, with the appellants as sureties. He collected a large amount of money as such collector, for which he failed to account, and his sureties sought to defend an action on his bond upon the ground that the act of the common council in creating the office and in appointing Harrison was *ultra vires*, and void. The court held that the common council had no power to create such an office, but held, also, that Harrison and his sureties were estopped from denying the validity of the ordinance creating the office and requiring him to collect the money: *Mayor* v. *Harrison*, 30 N. J. L. 73.

To a similar effect is *Middleton* v. *State ex rel.*, 120 Ind. 166. So, too, in *Hendersonville* v. *Price*, 96 N. C. 423, where a party executed his bond to a municipal corporation for a license tax, instead of paying cash therefor "in advance" as required by the law; and upon this it was ruled that though the commissioners of the town had no authority to take a bond in lieu of the money, yet that neither the defendant nor his sureties were in a position to deny their liability on the bond; that the taking of the bond was not prohibited by law, nor the consideration thereof illegal; the principal in the bond had obtained

thereby a license, and enjoyed all the benefits that the payment of the tax would have given him, and therefore he and his sureties were estopped to defend against an action on the bond; the court, in the course of their remarks, quoting with approval this extract from a text-writer heretofore cited: "Though a contract be in fact wholly invalid when executed, still (supposing it not to be prohibited by law as relating to some illegal transaction), if it be acted upon afterwards by the parties to it as valid, they will, if *sui juris*, be estopped thereafter to allege its invalidity": Bigelow on Estoppels, 5th ed., 685.

Where the act under which an assignment was made was unconstitutional and void as to creditors whose demand existed prior to the passage of the act, still, they, having come in and accepted dividends under the assignment, were estopped to call on the stockholders for the payment of the residue of their debts not received under the assignment: *Van Hook* v. *Whitlock*, 26 Wend. 43; 37 Am. Dec. 246.

In another case, the charter of a city provided that the city council should have power to cause streets to be opened, paved, etc., upon the petition of not less that two thirds of the abutting owners, and it was held that a person who joined in such a petition was estopped from afterward claiming that the assessment of the tax for the improvement petitioned for was unauthorized because two thirds of the abutting owners did not join in the petition: *City of Burlington* v. *Gilbert*, 31 Iowa, 356; 7 Am. Rep. 143.

Other cases announce this general proposition that where an unconstitutional statute has been procured by a person, or he has derived interest and consideration thereunder, that he cannot keep the consideration and repudiate the statute: *Daniels* v. *Tearney*, 102 U. S. 415; *Ferguson* v. *Landram*, 5 Bush, 230; 96 Am. Dec. 350.

The point in hand is well illustrated in a very recent case in New York. The city sued to recover rent accrued under a lease of a certain pier, and the defendant put his defense on the sole ground that the lease had not been made in pursuance of any sale or public auction of the privilege conferred as required by the statute; but it was ruled that this constituted no defense; that the defendant, having enjoyed the benefit of the contract, was estopped to deny its validity, and that the same rule applied in such circumstances to a municipal as well as another corporation: *Mayor etc.* v. *Sonneborn*, 113 N. Y. 423.

The case of *Montgomery* v. *Montgomery etc. Plank Road Co.*, 31 Ala. 76, is opposed to the foregoing views; but we are satisfied with their correctness. Besides, that case appears not to be in line, as already seen, with authorities elsewhere: Bigelow on Estoppel, 5th ed., 466, note.

We are unable to see why a defendant in a case of this sort should not be estopped from retaining benefits received by him under a contract, though made *ultra vires* a municipal corporation, as he certainly would under similar circumstances were the other contracting party a natural person laboring under some legal disability.

In ruling thus, we give no sanction to a municipal corporation leaving the narrow pathway marked out by its charter, nor do we intimate that we would enforce an *ultra vires* contract if executory; we merely hold that good morals and even-handed justice demand that the defendant should disgorge.

Moved by these considerations, we affirm the judgment.

MUNICIPAL CORPORATION — CONTRACTS — ULTRA VIRES. — Persons dealing with a municipal corporation are chargeable with knowledge of its powers: *Syracuse W. Co.* v. *Syracuse*, 116 N. Y. 167. And the rule is, that a city cannot be bound by contracts made by it outside of its powers: *Burchfield* v. *New Orleans*, 42 La. Ann. 235; *Rens* v. *Grand Rapids*, 73 Mich. 237; *Sutro* v. *Petit*, 74 Cal. 332; 5 Am. St. Rep. 442; the doctrine of *ultra vires* being applied with greater strictness to municipal corporations than to private corporations: *Newberry* v. *Fox*, 37 Minn. 141; 5 Am. St. Rep. 830; *Gurley* v. *New Orleans*, 41 La. Ann. 75; *Bogart* v. *Lamotte Township*, 79 Mich. 294. But the plea of *ultra vires* must not prevail, whether interposed for or against a corporation, when justice would not be promoted or a legal wrong would be done: *Portland etc. Co.* v. *East Portland*, 18 Or. 21. In *Covington etc. R. R. Co.* v. *Athens*, 85 Ga. 367, it is decided that a contract entered into by a city, outside of its powers, and contrary to public policy, is void, notwithstanding the fact that the city has received some benefits thereunder.

ESTOPPEL — PARTY ENJOYING BENEFITS OF A CONTRACT. — A person who has received benefits under an executed contract is estopped to deny its validity on the plea of *ultra vires*: *Sherman Center T. Co.* v. *Morris*, 43 Kan. 282; 19 Am. St. Rep. 134. This rule is applied to a case in which one who has enjoyed the benefits of a privilege granted to him by a municipal corporation sought to deny the power of the municipality to make the contract awarding such privilege: *Town of Monticello* v. *Cohn*, 48 Ark. 254; *Mason* v. *Main Jellico M. C. Co.*, 87 Ky. 467.

CONVICTS — HIRING OUT FOR WORK. — Statutes authorising the hiring out of convicts, or persons imprisoned in jails under conviction of crime, are constitutional: *Holland* v. *State*, 23 Fla. 123; *Mason* v. *Main Jellico M. C. Co.*, 87 Ky. 467.

EMMEL *v.* HAYES.

[102 MISSOURI, 186.]

SPECIFIC PERFORMANCE — PAROL CONTRACT TO CONVEY. — Possession of land by the vendee, taken with the consent of the vendor, and under a parol contract by him to convey, will take the case out of the statute of frauds, and authorize compulsory specific performance, only when the taking of possession is pursuant to and referable solely to the parol contract.

SPECIFIC PERFORMANCE — PAROL CONTRACT TO CONVEY — PART PERFORMANCE. — MERE CONTINUANCE OF POSSESSION does not constitute part performance so as to authorize specific performance of an alleged parol contract to convey land. There must be some notorious and radical change in the attitude of the contracting parties towards each other, which in itself indicates that some contract has been made between them, before parol evidence is admissible to show the details of the agreement.

VENDOR AND VENDEE — PAROL CONTRACT TO CONVEY — WITNESS AGAINST DECEDENT. — The death of the vendor in a parol contract to convey renders the vendee incompetent to testify as to improvements made by him upon the land.

SPECIFIC PERFORMANCE — PAROL CONTRACT TO CONVEY — IMPROVEMENTS. — One in possession of land under a parol contract to convey is not entitled to specific performance upon the ground of improvements made upon the land, when they are such only as occur in the ordinary course of husbandry.

F. S. Heffernan and C. W. Thrasher, for the appellants.

Goode and Cravens, for the respondents.

SHERWOOD, J. An equitable proceeding to remove a cloud upon title caused by a deed of trust alleged to have been fraudulently made, and for the recovery of the following described land: West half of northeast quarter, section 36, township 31, range 21, and southeast quarter of northeast quarter, section 36, township 31, range 21, and the undivided one half tract in northeast quarter of northeast quarter, section 36, township 31, range 21.

The answer was a general denial, etc., with a count for specific performance. The other issues raised by the pleadings will be found hereafter as submitted to and settled by the verdict of the jury, to which such issues were sent for determination.

The testimony in this cause in relation to the count for specific performance is, in substance, the same as it was in *Simmons* v. *Headlee*, 94 Mo. 482, which being an action of ejectment, the equitable claim and defense of specific performance was set up. The statement of that evidence, as copied from that case, is the following: "John O'Day was in-

troduced as a witness by defendants, and, in substance, testified that he, in conjunction with his brother, T. K. O'Day, were the attorneys of defendant O'Callahan in a replevin suit in which he was plaintiff and Landor Sell was defendant; that on the trial, a part of the property in controversy was found to belong to O'Callahan, and a part to Sell, for which each respectively recovered judgment against the other, as well as a proportionate part of the costs; that execution was issued against the respective parties; that under the execution issued against Sell, his land was sold at the November term, 1881, of the circuit court of Greene County, and was purchased by said T. K. O'Day for thirty-five dollars; that under an execution which issued on the judgment in Sell's favor against O'Callahan, the land in question was sold on the 3d of December, 1881, and said P. T. Simmons became the purchaser for twenty-five dollars. The witness further stated that after these sales had been made, the firm of John O'Day and Brother, representing O'Callahan and said Simmons, of the law firm of Simmons and Hubbard, met for the purpose of settling matters between O'Callahan and Sell growing out of these and other judgments; that in the negotiations he advanced for O'Callahan five hundred dollars to pay a judgment against him in favor of Phœbe O'Callahan, also some money to pay to F. Emmel; that in the settlement it was agreed that T. K. O'Day should not take a deed for the land of Sell's which he had bought at said execution sale, and that said P. T. Simmons should convey or release to O'Callahan whatever title he might have acquired to his land under the sheriff's deed, on the payment of the amount of Sell's judgment against him, which amount was paid to said Simmons, and said T. K. O'Day did not take a sheriff's deed to the land of said Sell which he had bought at the execution sale. He further testified that the settlement was a final one, each man to retain his own lands, as if there had been no sale; that is, Sell and O'Callahan."

The evidence in this case, as in the one referred to, shows that P. T. Simmons, the ancestor of the minor plaintiffs for whose benefit this proceeding was instituted, had acquired the title to the property in controversy by reason of a sheriff's sale of the land as that of Thomas O'Callahan under an execution issued against him in favor of Landor Sell. A sheriff's deed in pursuance of this sale was duly made to said Simmons, December 3, 1881, and put to record the 27th of that month,

the judgment of Sells, under which the sale occurred, having been assigned to Simmons and Hubbard.

The issues of fact heretofore mentioned were submitted by the court to the jury as follows: —

1. Was O'Callahan indebted to Hayes in the sum of three thousand dollars when the deed of trust was executed by O'Callahan to Thomas K. O'Day for James Hayes?

2. Was said deed of trust executed wholly or in part to deceive and defraud purchasers at execution sales of said land under judgments against O'Callahan?

3. Was the deed of trust in evidence by Thomas O'Callahan to Thomas K. O'Day, trustee for James Hayes, and the agreement in evidence executed by James Hayes to Thomas O'Callahan, during his natural life, executed in good faith by said parties for the purpose therein stated?

4. Was the defendant O'Callahan threatened with executions at the time of the execution of deed of trust in evidence?

5. Was it the intention when said deed of trust was executed of the parties thereto, that said land should be preserved thereby for the use and benefit of O'Callahan, the grantor?

6. Did Thomas O'Callahan or his attorney, during the lifetime of Phillip T. Simmons, make a settlement with said Simmons to pay said Simmons certain sums of money on condition that said Simmons was to release to said O'Callahan the land purchased by said Simmons on execution sales against said O'Callahan?

The jury returned their verdict on said interrogatories and issues submitted, as follows, to wit: —

"We, the jury, find in answer to first interrogatory, No.

"We, the jury, find in answer to second interrogatory, Yes.

"We, the jury, find in answer to third interrogatory, No.

"We, the jury, find in answer to fourth interrogatory, Yes.

"We, the jury, find in answer to fifth interrogatory, Yes.

"We, the jury, find in answer to the sixth interrogatory, Yes."

These findings of fact by the jury were adopted by the court, and resulted in a judgment for the plaintiffs, from which the defendants appeal.

1. The controlling question in this cause, and the one to which our chief attention will be directed, is, whether, upon the evidence adduced, the defendant O'Callahan was entitled to a decree for specific performance.

The taking possession of a tract of land by a vendee, under

a parol contract made by a vendor to convey to him, and with the consent of such vendor, will take the case out of the statute of frauds, and authorize compulsory specific performance, only where such taking of possession is pursuant to, and referable solely to, the parol contract. Nothing short of this unequivocal act of taking possession will suffice. This doctrine is of almost universal prevalence, and announced in cases too numerous for mention or of ready computation. It has obtained in this state since the earliest period of its history down to the present time, as the following cases will show: *Bean* v. *Valle*, 2 Mo. 126; *Parke* v. *Leewright*, 20 Mo. 85; *Charpiot* v. *Sigerson*, 25 Mo. 63; *Wiley* v. *Robert*, 31 Mo. 212; *Ells* v. *Pacific R. R.*, 51 Mo. 200; *Spalding* v. *Conzelman*, 80 Mo. 177; *Bowles* v. *Wathan*, 54 Mo. 261; *Sitton* v. *Shipp*, 65 Mo. 297. And those cases are in accord with all well-considered cases elsewhere. This is abundantly shown by the authorities cited by counsel for plaintiff.

The uniform statement of the text-writers and the reported ruling of adjudged cases is, that mere continuance of possession does not constitute part performance. There must be a radical change in the attitude of the contracting parties towards each other,—a change consisting of acts done,—a notorious change which itself indicates that some contract has been made between the parties; and then parol evidence is admissible to show the details of the agreement: Wood on Landlord and Tenant, 2d ed., 374, and cases cited; Browne on Frauds, 2d ed., secs. 455, 457, 472, 473, 477.

In the last section cited, the learned author says: "It is abundantly settled that if one who is already in possession of land as tenant verbally contract with the owner for a new term, his merely continuing in possession after the making of the alleged contract is not an act of part performance within the meaning of the rule, so as to justify a decree for a lease according to the contract. In such a case, the continued holding is naturally and properly referable to the old tenancy, and does not necessarily imply any new agreement between the parties. The same reasoning applies, of course, where the contract set up is the sale of the estate to the defendant by the owner of the fee."

Pomeroy says: "A plaintiff cannot, in the face of the statute, prove a verbal contract by parol evidence, and then show that it has been partly performed. This course of proceeding would be a virtual repeal of the statute. He must first prove

acts done by himself or on his behalf which point unmistakably to a contract between himself and the defendant, which cannot, in the ordinary course of human conduct, be accounted for in any other manner than as having been done in pursuance of a contract, and which would not have been done without an existing contract; and although these acts of part performance cannot of themselves indicate all the terms of the agreement sought to be enforced, they must be consistent with it, and in conformity with its provisions, when these shall have been shown by the subsequent parol evidence. It follows from this invariable rule that acts which do not unmistakably point to a contract existing between the parties, or which can be reasonably accounted for in some other manner than as having been done in pursuance of such a contract, do not constitute a part performance sufficient in any case to take it out of the operation of the statute, even though a verbal agreement has actually been made between the parties. For a like reason, the mere possession of the premises by a tenant, continued after the expiration of his term, is not a sufficient part performance of a verbal contract to renew the lease or to convey the land, because such possession may be as reasonably and naturally explained by his holding over as by an agreement to renew or to convey; in other words, it does not unequivocally point to the existence of a contract between the parties, but is referable to another cause. The rule is general in its application and fundamental in principle that acts which are referable to something else than the verbal agreement, and which may be ordinarily otherwise accounted for, do not constitute a sufficient part performance of it": Pomeroy on Specific Performance, 154, 155. See also Fry on Specific Performance, sec. 380; Bispham's Equity, sec. 385; Sugden on Vendors, 14th Am. ed., sec. 152; *German* v. *Machin*, 6 Paige, 289.

Speaking of the probative effect of possession, an author already quoted says: "Merely taking or holding possession is of itself nothing. The question is *quo animo* it is taken or held, and this is not allowed to be answered by parol proof of the agreement between the parties. But in cases where a tenant continues in possession under an alleged agreement for a new tenancy, it is answered by proof of any act on his own part, done with the privity of the owner of the fee, which is inconsistent with the previous holding, and is such as clearly indicates a change in the relation of the parties. Where the tenant, continuing in possession, makes improvement upon the prem-

ises, this fact is of great weight to show a change in the holding. But they must, of course, be of such a marked and important character as to be not naturally reconcilable with the continuance of the old relation": Browne on Frauds, secs. 478, 480.

Having made these extensive quotations from the authorities, the purpose of making which will be made manifest a little further on, we will now turn our attention to some of the cases cited by defendants as supporting their contention in this cause, — a contention at variance with the views heretofore expressed as to the necessity of showing something more than a mere retention of possession. The case of *Brown* v. *Jones*, 46 Barb. 400, was one where a purchaser of land by a parol agreement was in possession at the time, though the land was wild and uncultivated, who thereupon made permanent improvements by clearing and cultivating the same, which clearing and cultivation added fifty per cent to the value of the land; and he also paid all taxes and assessments, etc., and it was held he was entitled to specific performance on paying the purchase-money. In *Payne* v. *Coombs*, 1 De Gex. & J. 34, a parol agreement was entered into for a lease of a farm; a solicitor was seen by both parties, and he was directed to prepare a rough draught for a lease, which he did, and forwarded it to the lessor, who, without objecting to it, let the tenant into possession and directed the solicitor to prepare a lease in conformity to the draught; and upon this it was ruled that the delivery and taking of possession was a sufficient part performance of the agreement as expressed in the draught to exclude a defense founded on the statute of frauds, and, by consequence, to authorize specific performance.

The case of *Gregory* v. *Mighell*, 18 Ves. 328, was one where a parol agreement for a lease was made, and the allegation of the answer resisting performance, that possession was taken without the defendant's consent, was thought by Sir William Grant, M. R., to be disproved by two witnesses, as well as by the very significant and pregnant fact that the defendant allowed the plaintiff to maintain the possession as tenant, making expenditures for eight years before he brought ejectment; and therefore that eminent master of the rolls held that the defendant was not at liberty to say that it was a possession without consent, and that plaintiff was a trespasser, and so specific performance was decreed.

In *Fisher* v. *Moolick*, 13 Wis. 321, Moolick was a pre-emptor

of a piece of public land, and, while in possession of it, applied to Fisher for a loan of money to enable him to enter the land within the year. The arrangement was effected whereby Fisher entered the land, took the receiver's receipt in his own name, with the parol agreement to convey the land to defendant upon the payment of fifty dollars in one year with twenty-five per cent interest. Fisher was willing, after the entry, to confirm the matter by a written contract to that effect, and sent word of that purport to Moolick to come and get such a contract, but died before executing it. Meanwhile, after the entry, Moolick went on under the faith of the parol contract, and, with the consent of Fisher, made valuable improvements on the land, and, upon the death of Fisher, paid up the principal and interest to the administrator, taking written receipt containing a memorandum of the description of the land, and the administrator thereupon took the money thus obtained and paid it over as directed by the probate court. And upon this showing, the ejectment of the heirs of Fisher against Moolick was defeated, and a decree entered in behalf of the latter. *Miller* v. *Ball*, 64 N. Y. 286, was one similar in its general circumstances to the one cited from Wisconsin.

In all of these cases cited, it will be observed that there was a radical and marked change in the circumstances of the party claiming specific performance,—a change which plainly indicated that some kind of a contract had been made between them. But here, in the case at bar, what have we to indicate any change in the attitude of the parties towards each other? What acts were done? None whatever. The only thing pretended to be done was the bare retention of the possession of the property, which was in no proper sense an act at all.

The case of *Snyder* v. *Thrall*, 56 Wis. 674, was the case of the sale of a house as personal property on which a chattel mortgage had been given. There was no question of specific performance in the case, nor could there have been. The head-notes disclose the whole case, as follows: "Property in the possession of a bailee may be sold to him, and a good delivery made, without being actually taken into the possession of the owner and then returned to the possession of the vendee."

"So where a house (treated as personal property) was in the possession of the vendee at the time of the sale thereof, and he continued in possession after and under the sale, it is held that there was such a delivery as would take the con-

tract out of the statute of frauds, although no part of the purchase-money was paid, and no note or memorandum of the contract was made in writing."

That case was much relied on in the opinion of this court in *Simmons* v. *Headlee*, 94 Mo. 482, where it was held that the bare retention of the possession by the former owner was sufficient to take the case out of the statute of frauds; and it was there said, in support of this view, that to require O'Callahan "to surrender the possession he had, and then take possession under the contract, is extremely technical." That this view is wholly unsupported by authority has been already shown by the extensive quotations and extracts already made for that purpose. And it may be remarked that the necessity for surrendering the possession under the circumstances supposed, and the taking of the possession under the contract, is no more "technical" than that required of a tenant when he would dispute the title of his landlord; for he, in order to do this, must first surrender the possession of the premises in good faith to his landlord, and then he can resume the possession and dispute his landlord's title successfully: 2 Wood on Landlord and Tenant, 2d ed., secs, 498–500, and notes; *Littleton* v. *Clayton*, 77 Ala. 571.

These considerations constrain us to say that we erred in our rulings in *Simmons* v. *Headlee*, 94 Mo. 482, as well as in the similar case of *Emmel* v. *Headlee*, 7 S. W. Rep. 22, Mo., Feb. 20, 1888. Consequently we will no longer adhere to these rulings.

2. The conclusions reached by the trial court in adopting the verdict of the jury on the issues of fact submitted to them, we see no reason to disturb.

3. There was no error in excluding the testimony of the defendant O'Callahan about the alleged improvements made by him after the alleged parol purchase from Simmons, as the latter was dead, and this rendered O'Callahan incompetent as a witness: *Sitton* v. *Shipp*, 65 Mo. 297; *Ring* v. *Jamison*, 66 Mo. 424; *Chapman* v. *Dougherty*, 87 Mo. 617; 56 Am. Rep. 469; *Meier* v. *Thieman*, 90 Mo. 433.

4. Again, it does not appear in what the improvements alleged to be made by O'Callahan consisted. If the improvements were such as occur in the ordinary course of husbandry, this would give no additional strength to the case of the defendant: Browne on Frauds, sec. 480.

Controlled by the foregoing reasons, we affirm the judgment.

SPECIFIC PERFORMANCE — PAROL CONTRACTS OF SALE. — The rule is that parol contracts for the sale of land are invalid: *Hall* v. *Wallace*, 88 Cal. 434; *White* v. *O'Bannon*, 86 Ky. 93; and will not be specifically enforced: *Dean* v. *Cassiday*, 88 Ky. 572; *Corliss* v. *Conable*, 74 Iowa, 59; *McGinnis* v. *Fernandes*, 126 Ill. 228; *Cloud* v. *Greasley*, 125 Ill. 313; *Jackson* v. *Myers*, 120 Ind. 504; *Mellon* v. *Davison*, 123 Pa. St. 298; *Pitt* v. *Moore*, 99 N. C. 85; 6 Am. St. Rep. 489; unless there has been such a part performance thereof as will take them out of the operation of the statute of frauds: *Morrison* v. *Herrick*, 130 Ill. 631; *Putnam* v. *Tinkler*, 83 Mich. 628; *Wallace* v. *Scoggins*, 17 Or. 476; *Graft* v. *Loucks*, 138 Pa. St. 453; *Barrett* v. *Forney*, 82 Va. 269; such as actual possession and the making of improvements on the part of the vendee: *Calanchini* v. *Branstetter*, 84 Cal. 249; *Hunt* v. *Hayt*, 10 Col. 278; *Bragg* v. *Olson*, 128 Ill. 540; *Pond* v. *Sheean*, 132 Ill. 312; *Everett* v. *Dilley*, 39 Kan. 73; *Schuey* v. *Schaeffer*, 130 Pa. St. 16; *Wooldridge* v. *Hancock*, 70 Tex. 18; *Griggsby* v. *Osborn*, 82 Va. 371; *McWhinne* v. *Martin*, 77 Wis. 182. The vendee's possession, however, must be with the vendor's consent, and in pursuance of the parol contract: *McLure* v. *Tennille*, 89 Ala. 572; *Recknagle* v. *Schmaltz*, 72 Iowa, 63; *Cloud* v. *Greasley*, 125 Ill. 313; *Boozer* v. *Teague*, 27 S. C. 348. Compare *Peck* v. *Peck*, 77 Cal. 106; 11 Am. St. Rep. 244, and note. While the vendee's possession may not be such as to take a parol contract of sale out of the operation of the statute of frauds, it will entitle him to a lien for the consideration paid: *Usher* v. *Flood*, 83 Ky. 552.

KNOOP *v.* KELSEY.

[102 MISSOURI, 291.]

ESTOPPEL — FRAUDULENT CONVEYANCE. — A judgment creditor who sells an equity of redemption under execution, thereby asserts the validity of the mortgage, and is estopped from afterwards denying its validity by asserting that it was fraudulent as to creditors.

ESTOPPEL — PLEADING. — A party is estopped by the allegations in his own pleading.

Smith, Silver, and Brown, A. L. Thomas, and Cosgrove and Johnston, for the plaintiffs in error.

B. R. Richardson, Edwards and Davison, and Draffen and Williams, for the defendant in error.

BLACK, J. This is a suit in equity brought by C. H. Knoop against J. B. Kelsey, Charles T. Kelsey, Charles D. Nixon, and Green Huffman. There was a decree for the plaintiff. It is insisted that the second amended petition, upon which the cause was tried, fails to state any cause of action, and this question runs through the whole case, so that it must be determined at the outset.

The facts stated are these: That on the 20th of July, 1882, the defendant J. B. Kelsey was a banker at Versailles, in Morgan County, in this state; that he held himself out to be

solvent, when in fact he was insolvent; that he owned 400 acres of land in that county, and on the 22d of July, 1882, made a deed of trust thereon to secure his note dated the 1st of August, 1882, for $3,000, payable to the defendant Charles T. Kelsey in five years after date, and that defendant Nixon is the trustee in the deed of trust; that on the 5th of August, 1882, plaintiff deposited with J. B. Kelsey $2,782, and at that time the deed of trust had not been recorded; that J. B. Kelsey failed on the 22d of said month, and his bank was closed by attachments; that the deed of trust to Nixon was made for the sole purpose of defrauding the creditors of J. B. Kelsey; that plaintiff obtained a judgment against J. B. Kelsey at the April term, 1883, for $1,703, being the balance then due upon the deposit, and upon which judgment execution was issued.

The amended petition then goes on to say: "Plaintiff further states that at the October term, 1883, of the Morgan County circuit court, the interest of J. B. Kelsey (being his equity of redemption in said real estate) was sold by the sheriff of Morgan County on several executions issued on several judgments against J. B. Kelsey, including plaintiff's execution; that the sheriff, in his advertised notice of sale, gave special notice that he would sell the land subject to all prior liens and encumbrances, and did also give the same notice to the bidders and by-standers at the sale, and that defendant Green Huffman, who had been J. B. Kelsey's tenant and friend, became, for the nominal sum of $285, the purchaser of J. B. Kelsey's equity of redemption, subject to the deed of trust aforesaid, and with full knowledge of the same, it being then on record, and presumed by plaintiff and Huffman and all others to be a good and valid instrument and encumbrance; that said Huffman immediately entered into the possession of said land, and has ever since remained in possession as owner of J. B. Kelsey's equity of redemption therein; that the fact of the said deed of trust having been executed and recorded as aforesaid prevented said lands from selling at the sheriff's sale for as large a sum of money as they otherwise would have done, and plaintiff was thereby prevented from realizing the amount of his said judgment out of said lands."

The prayer is, that the deed of trust be declared null and void, and that the titles of Nixon and Charles T. Kelsey, as the pretended trustee and beneficiary, be divested out of them, and that the land be subjected to plaintiff's judgment as the

prior lien thereon, and that if said judgment be not paid and satisfied in such time as the court should direct, that the land be sold by the sheriff to satisfy said judgment and costs, and for general relief.

The answer of Charles T. Kelsey and Nixon is a general denial. Huffman, in his separate answer, says he purchased the land at a sale on various executions, one of which was in favor of the plaintiff; that he purchased the land subject to prior liens and encumbrances, and is ready to discharge such mortgages and liens as may be found due.

The court, by its decree, declared the deed of trust fraudulent as against the plaintiff, and substituted the plaintiff to "the rights of the holder of the note" to the extent of plaintiff's judgment, and then ordered a sale of the land.

This is certainly a novel proceeding. The substance of the case stated in the petition is this: J. B. Kelsey made a deed of trust on the four hundred acres of land. Thereafter his creditors, the plaintiff being one of them, obtained judgments against him, and, under executions issued thereon, advertised, and in terms sold, his equity of redemption, and nothing more. The plaintiff now seeks to set aside the deed of trust because it was made in fraud of creditors, and to be substituted in the stead of the fraudulent mortgagee.

Judgment creditors have two remedies against a fraudulent conveyance, be it a deed or mortgage, or a deed of trust in the nature of a mortgage. They may file their bill to set it aside and subject the land to the payment of their debts; or they may sell all the right, title, and interest of the debtor, and in that case the purchaser succeeds to all of the rights of the creditors to set aside and avoid the fraudulent conveyance: *Lionberger* v. *Baker*, 88 Mo. 452. A conveyance made in fraud of creditors is, as to them, void, at their option. They may affirm it if they see fit to do so. As these creditors, in terms, sold the equity of redemption, the question arises whether they can now turn around and say that the deed of trust is void as to them, and thus, in effect, say there was no equity of redemption.

In some of the New England states unencumbered lands are not sold at auction, but are appraised and set off by way of extent to the judgment creditor. If encumbered by mortgage, the equity of redemption may be sold at auction: 2 Freeman on Executions, sec. 372. In several of these states it is held that a purchaser who bids for and buys the equity of re-

demption cannot dispute the validity of the mortgage subject to which he purchased; and this is true whether the purchaser be a stranger or the creditor himself. In either case he is estopped to deny the validity of the mortgage, and cannot be heard to say that it was fraudulent as to creditors: *Lord* v. *Sill*, 23 Conn. 324; *Brown* v. *Snell*, 46 Me. 490; *Flanders* v. *Jones*, 30 N. H. 154; *Russell* v. *Dudley*, 3 Met. 147; *Freeland* v. *Freeland*, 102 Mass. 478. The principle is not confined to those states. In *Messmore* v. *Huggard*, 46 Mich. 559, a creditor obtained judgment, and sold the equity of redemption in the land of the debtor, and became the purchaser thereof. He then sought to set aside the mortgage because it was made in fraud of creditors. The court denied the relief, and said, among other things, that a purchase under such circumstances must be held to be what it appeared to be at the sale, —a purchase subject to the mortgage.

We have no law in this state requiring lands taken on execution to be appraised, and it is not necessary to sell simply the equity of redemption even in those cases where the encumbrance is conceded to be valid. The usual and proper method is to sell all the right, title, and interest of the judgment debtor, and as before stated, the purchaser succeeds to all of the rights of the creditor. If, instead of selling all of the right, title, and interest of the debtor, the creditor will, in terms, advertise and sell the equity of redemption, he must abide the consequences. By simply selling the equity of redemption, he asserts the validity of the mortgage; for if fraudulent as to creditors, then, as to them, there is no equity of redemption to sell. By selling the equity of redemption, persons are induced to bid on the supposition that the mortgage is valid, and, as said in the case last cited, the mortgagee has no occasion to bother himself about the sale. The creditor, having induced purchasers and the mortgagee to act upon the supposition that the validity of the mortgage is conceded, ought not to be permitted to change front and assail the mortgage. The creditor is bound by his election, as well as the purchaser at the sale. The principle that where one has an election between inconsistent courses, he will be confined to the one which he first adopts, has been applied in a variety of cases: *McClanahan* v. *West*, 100 Mo. 309. The plaintiff states in his petition that the equity of redemption only was advertised and sold, and he must abide by his own pleading: *Lenox* v. *Harrison*, 88 Mo. 491; *Ramsey* v. *Henderson*, 91 Mo. 560.

The matters alleged in the plaintiff's pleading furnish no round for the decree rendered. In short, the amended petition states no cause of action whatever; on the contrary, it tates the plaintiff out of court. This result disposes of this ase, and it is unnecessary to consider the question whether n fact the deed of trust is fraudulent.

Thus far we have treated the case as we find it stated in the mended petition. The proofs indicate that the sale was made n the usual way, and that in point of fact the sheriff sold all of he right, title, and interest of the execution defendant in the and. Whether that sale was made under such circumstances hat it should be set aside and a new sale ordered, or whether plaintiff has any other remedy on a proper petition, we do not ndertake to say; but the cause will be remanded, with leave o the parties to amend their pleadings.

Reversed and remanded.

ESTOPPEL. — VENDEE, AFTER AN ALLEGED PURCHASE OF GOODS, IS ESTOPPED by the levy of an execution in his favor upon the same goods as the property of the vendor from claiming the goods in any other way than by virtue of such levy: *Field* v. *Langsdorf*, 43 Mo. 32; 97 Am. Dec. 367; compare *Martin* v. *Zellerbach*, 38 Cal. 300; 99 Am. Dec. 365. In *Bullard* v. *Hinkley*, 6 Greenl. 289, 20 Am. Dec. 305, it was decided that a fraudulent mortgage creates no equity of redemption as to a creditor of the mortgagor who, by extending his execution upon the mortgaged land, elects to treat it as a nullity. The sale of the equity of redemption of such a mortgage conveys nothing.

PLEADINGS, ESTOPPEL BY. — A party is bound by admissions made in his pleadings: *Howard* v. *Glenn*, 85 Ga. 238; 21 Am. St. Rep. 156; *Wilcoxson* v. *Burton*, 27 Cal. 228; 87 Am. Dec. 156.

FURNISH *v.* MISSOURI PACIFIC RAILWAY COMPANY.

[102 MISSOURI, 438.]

CARRIERS OF PASSENGERS. — CARE REQUIRED BY RAILWAY TOWARDS PASSENGERS is the highest practicable care, caution, and diligence which capable and faithful railroad men would exercise under similar circumstances.

CARRIER OF PASSENGERS — LIABILITY FOR SLIGHT NEGLIGENCE. — A carrier of passengers by railway is liable for injury resulting from slight negligence on its part.

CARRIER OF PASSENGERS, CARE REQUIRED OF. — A carrier of passengers by railway is bound to furnish reasonably safe and sufficient road-bed, tracks, cars, and engines, so far as the utmost human skill, diligence, and foresight can provide, and this means such skill, diligence, and foresight as is exercised by a very cautious person under like circumstances.

CARRIERS OF PASSENGERS — LIABILITY FOR DEFECT IN ROADWAY. — A carrier of passengers by railway is liable for a failure to discover a defect in its road-bed or roadway which could have been discovered by a proper discharge of its duty of inspection in time to avert an accident.

CARRIER OF PASSENGERS — PRIMA FACIE CASE OF INJURY — BURDEN OF PROOF. — A passenger by railway makes a *prima facie* case of negligence against the company by showing the facts of the derailment of the cars and his injury. The burden of proof then rests on the company to show that it has not been negligent.

PRACTICE ON APPEAL — EXCESSIVE VERDICT, WHEN SET ASIDE. — The supreme court will set aside a verdict as excessive in exceptional cases, and when satisfied that the evidence does not support the assessment of damages, as in other instances of failure of proof.

ACTION by Martha A. Furnish against the defendant company to recover damages for injuries sustained by her while a passenger on defendant's train, and caused by the derailment of such train. Plaintiff recovered a judgment for fifteen thousand dollars, and the defendant appealed. The instructions asked by defendant at the trial, and refused by the court, and referred to in the opinion, were as follows: 1. "The jury are instructed that under the pleadings and evidence in this case the plaintiffs cannot recover, and you will find for the defendant"; 2. "Although the jury may believe that the train in which Martha A. Furnish was riding was overturned by some defect in defendant's road-bed, track, ties, cars, engine, or machinery, yet they will find for defendant, unless they further find from a preponderance of the evidence that the defendant's employees knew of such defect, or by the exercise of reasonable skill and diligence could have discovered such defect"; 3. "If the jury believe from the evidence that at the time said train was overturned the employees of the defendant were exercising, and had exercised, the highest practical diligence which capable and faithful railroad men would exercise under similar circumstances, and that the said train was thrown or run off the track, and was overturned by causes which were unknown to the defendant, and which could not have been known to the defendant by the exercise of reasonable care and caution, skill and diligence, then the plaintiff cannot recover in this action, and the finding must be for the defendant"; 4. "The jury are instructed that although they may believe from the evidence that some of defendant's ties of its road-bed were decayed or rotten, as described by some of plaintiff's witnesses, yet before they can find a verdict for plaintiff on this ground, they must believe from a preponderance of the evidence that such condition caused the train

to be thrown from the track, by which plaintiff suffered the injury complained of"; 5. "The jury are instructed that although they may believe that one of the drive-wheels of the locomotive which was hauling the train in question had been re-tired, and that the new tire had not been turned down, before they can find a verdict for the plaintiff on this ground, they must believe from a preponderance of evidence that it was necessary to have the same turned down to render it fit and proper to be used so as to avoid accident, and they must further believe that the defendant's failure to have the same turned down did cause the injury complained of; and in this connection the jury are further instructed that if they believe that Mr. New, master-mechanic of defendant, was a skillful, experienced mechanic, familiar with the construction and repair of locomotive-engines, defendant had a right to rely upon his judgment, and his decisions thereunder, as to the necessity of turning down the tire of said drive-wheel, and the defendant is not liable for any error of judgment of said New in that regard." The other facts are stated in the opinion.

Adams and Buckner, for the appellant.

Gates and Wallace, for the respondent.

BARCLAY, J. It is conceded by defendant that the case made by plaintiff entitled her to its submission to the jury, and no question of her contributory negligence was raised at any time. The exceptions now urged are only those bearing on the correctness of the instructions and on the amount of plaintiff's damages.

1. Defendant's chief objection is to the rulings of the trial court marking the degree of care to be maintained by it as a carrier of passengers.

It should first be noted that the instruction given (of his own motion) by the court defined the care required of defendant toward passengers as the "highest practicable care, caution, and diligence which capable and faithful railroad men would exercise under similar circumstances."

This instruction was given without objection from any quarter, and therefore must be accepted as the law for the case in hand, without regard to its correctness or incorrectness in the abstract. And since it states the rule substantially as laid down in the other instructions, there is serious doubt whether defendant is in position to question the latter

now. But we do not deem it necessary to dispose of the question upon any such narrow ground of practice. Being satisfied of the soundness of the rulings of the trial court on this subject, we think it opportune to consider them from a standpoint of wider range.

Throughout the instructions it is asserted that the duty owing by a steam-railway carrier to its passengers is to furnish reasonably safe and sufficient road-bed, track, cars, and engine, "so far as human skill, diligence, and foresight could provide"; and that defendant "is responsible for all injuries resulting from slight negligence" on its part. In another part of them, the import of the words "utmost human skill, diligence, and foresight," as used by the court, is explained to be "such skill, diligence, and foresight as is exercised by a very cautious person under like circumstances." This is, substantially, and almost literally, the same language as is approved by text-writers of high authority in summarizing the law deducible from all the precedents: Story's Bailments, sec. 601; 2 Greenl. Ev., sec. 221; 2 Kent's Com. 601.

The court also told the jury that the defendant, as a common carrier of passengers, did not undertake to insure the safety of plaintiff.

Taking the declarations of law together, we think they stated the obligations of defendant to plaintiff, as its passenger, with great accuracy. To exercise the highest practical care which capable and faithful railroad men would take, in like circumstances, to provide a track, rolling stock, and service reasonably fit and sufficient to perform the contract of transportation into which the carrier has entered, is the measure of defendant's legal duty in such cases.

That rule does not rest upon any artificial or technical division of negligence into grades or classes, but springs naturally from an application to such facts of the general principle that a man of ordinary prudence is required to exercise a care proportionate to the risks he assumes in the business he has in hand. Where he undertakes a risk involving safety of life and limb to those with whom he deals, he is charged with a care proportionate to the peril.

When a passenger commits his person to a carrier for hire for transportation by railroad over rivers, across mountains, through cities, in the night, — it may be while asleep, — at a speed expressive of the progress of the age in which we live, he may justly demand the exercise of such care, on the part

of the carrier, against disaster, as in the nature of things such undertaking would imply. That degree of care has generally been defined in language such as was used in the instruction before us. It has been repeatedly approved by many courts, and we consider the rule so well established in our jurisprudence as to require no further argument to support it: *Leslie* v. *Wabash etc. R'y Co.*, 88 Mo. 50; *Pennsylvania Co.* v. *Roy*, 102 U. S. 451; *White* v. *Fitchburg R. R. Co.*, 136 Mass. 321; *Philadelphia etc. R. R. Co.* v. *Anderson*, 94 Pa. St. 351; 39 Am. Rep. 787; *Caldwell* v. *New Jersey Steamboat Co.*, 47 N. Y. 282. As stated above, we do not consider it in conflict with the ruling in *Dougherty* v. *Missouri R. R. Co.*, 97 Mo. 647.

The instructions of the court go no further than to declare it in various forms of expression, the meaning of which, taken as a whole, is unmistakable.

Irrespective of any question of the burden of proof, there was, in the present action, abundant evidence to justify the inference that the injury to plaintiff resulted from a derailment of the cars occasioned by the giving way of rotten and unsafe ties in the road-bed at the place of the accident. That such a defect in the roadway could have been discovered by a proper discharge of defendant's duty of inspection in time to avert the calamity the evidence strongly tended to show.

That duty was an essential part of defendant's obligation towards its passengers, and it was chargeable, in its performance, with any omission of the "highest practicable care of capable and faithful railroad men" (in the language of the court) in the circumstances: *Miller* v. *Ocean S. S. Co.*, 118 N. Y. 200.

2. Regarding the instruction (marked D) placing the burden of proof upon defendant to show that the injury did not occur through any omission to discharge its legal duty in the premises, it should be remarked that the same instruction first required plaintiff to establish that the car in which she was a passenger "ran off the track of defendant's railroad, and fell down the embankment thereof," and that she was thereby injured.

Thus framed, the instruction correctly expressed the law on the subject. The mere injury of plaintiff while a passenger did not call for explanation or proof from defendant. It first devolved on plaintiff to show some fact with reference to it from which negligence on defendant's part as a carrier might be fairly inferred. Here it was shown that the car ran off the

track and over the embankment. The condition of the roadway at that point warranted the inference that the injury was occasioned thereby. In that state of the case, if the jury found that plaintiff had been injured by the derailment of the car and its fall down the embankment, it then devolved on defendant to explain how these things occurred without breach of its duty to plaintiff as a carrier.

This is what the court said in effect, and it committed no error in so doing: *Hipsley* v. *Kansas City etc. R. R. Co.*, 88 Mo. 348; *Breen* v. *New York etc. R. R. Co.*, 109 N. Y. 297; 4 Am. St. Rep. 450; *Seybolt* v. *New York etc. R. R. Co.*, 95 N. Y. 562; 47 Am. Rep. 75.

It may not be entirely in accord with technical nicety to instruct that the burden of proof shifts to defendant in the course of such a trial. It might be more accurate to say (in proper form for the purposes of a jury trial) that the facts of the derailment of the car and of plaintiff's injury thereby make out a *prima facie* case of defendant's negligence which, unexplained, would justify a recovery; but in the ordinary course of administering law, it has become usual to declare that, on a certain showing by plaintiff in such cases, the burden of proof then rests on defendant to prove that it has not been negligent. We are not prepared to condemn that form of expression at this day, in view of our statute to the effect that in all proceedings we should regard substance rather than form (Rev. Stats. 1879, sec. 3586), and should not reverse for any error not affecting the substantial rights of the adverse party: Rev. Stats. 1879, sec. 3569.

3. Defendant's next contention is, that the court erred in refusing certain instructions requested by it. They are recited in the statement accompanying this opinion. We will consider them separately.

That numbered 1 declared that the plaintiff could not recover on the evidence. It is not argued here. Obviously, there is nothing in the exception to its refusal.

That numbered 2 is defective in holding defendant to the "exercise of reasonable skill and diligence" only. In view of what we have already said above, it is unnecessary to comment further upon it.

That numbered 3 is almost literally the same as that marked A, given by the court of its own motion, except that the words "aforesaid care" are substituted by the court for "reasonable care." As the instruction A was not objected or

excepted to, it is difficult to see how defendant can now avail itself of the refusal in question. But irrespective of that, we think the change made by the court was proper to bring the instruction into harmony with itself. Without that modification, two different degrees of care would have been stated in the same declaration of law as measuring defendant's liability. The court adopted the first one, as defined by defendant, and brought the rest of the instruction into consistency with it. To this, defendant took no exception, and is now concluded by the action of the trial court in that regard.

No point has been made in this court in any way upon the refusal of instructions numbered 4 and 5 as asked by defendant. There is, hence, no need to consider them. The court, in the instructions marked B and C (unexcepted to), gave to the jury as much of the requests referred to as the law warranted.

4. No complaint is entered against the instructions fixing the measure of damages; but it is earnestly insisted that the assessment by the jury of plaintiff's compensation of fifteen thousand dollars is excessive.

This court has no hesitation in setting aside a verdict when clearly satisfied that the evidence does not support the assessment of damages, as in other instances of failure of proof.

But many cases arise in which, at this distance from the trial court room, we feel ourselves disposed to defer to the action of the circuit judge on this point, and to resolve any reasonable doubts on the subject in favor of the correctness of his ruling approving the finding.

The trial court should, on motion, fearlessly and willingly reduce any verdict to its proper amount when the weight of the evidence indicates it as excessive. That judge has the advantage of forming his opinions from the living realities before him, and the impressions so obtained are far more reliable than those given by any transcript of the record on appeal. We therefore give great weight to his rulings on matters depending on the credibility of witnesses, on the physical appearances of parties, and the like. It is therefore of the utmost importance in the administration of justice that he should act firmly and promptly on such subjects, and apply a proper corrective to any unwarranted findings thereon by juries. The cases in which we can properly interfere are exceptional.

In the case before us there is evidence that the plaintiff is

probably crippled for life, owing to the injury of her spinal cord; that she suffers pain intermittently; that she was not able to walk before or at the time of the trial; was fifty-three years of age, and had left her house but once since the accident; that she was then carried out for fresh air, but was so pained that she did not go out again. She was examined at various times by several eminent physicians, among them by Dr. King, of Sedalia, one of the leading surgeons of the defendant; but defendant did not give the jury the benefit of Dr. King's observations of the case.

The plaintiff's injuries seem to me of such serious nature and extent as should preclude us from pronouncing excessive the damages awarded therefor, in view of former rulings as to the proper occasions for such interference: *Whalen* v. *St. Louis etc. R'y Co.* (1875), 60 Mo. 323; *Porter* v. *Hannibal etc. R. R. Co.* (1879), 71 Mo. 66; 36 Am. Rep. 454; *Klutts* v. *St. Louis etc. R'y Co.* (1882), 75 Mo. 642. Approved precedents have sanctioned many larger findings in cases of injuries of somewhat similar nature: *Harrold* v. *New York E. R. R. Co.*, 24 Hun, 184; *Chicago etc. R. R. Co.* v. *Holland*, 18 Brad. App. 418; affirmed 122 Ill. 461; *Woodbury* v. *District of Columbia*, 5 Mackey, 127.

But my learned associates differ with me on this branch of the case, and desire the announcement of their conclusion that the judgment be reversed, and the cause remanded, on the ground of excessive damages, unless plaintiff will remit five thousand dollars thereof within thirty days. From that conclusion my dissent is entered.

All the judges concur on the points discussed in this opinion, except as indicated in this (the fourth) paragraph.

CARRIERS OF PASSENGERS — CARE REQUIRED. — Carriers of passengers must exercise the utmost care and prudence which human foresight can suggest to secure their safety: *Palmer* v. *Delaware etc. Canal Co.*, 129 N. Y. 170; 17 Am. St. Rep. 629, and note; *Eureka etc. R'y Co.* v. *Timmons*, 51 Ark. 459.

CARRIERS OF PASSENGERS — DUTY AS TO THE CONSTRUCTION OF ROADWAYS. — A latent defect in a roadway, such as will excuse a carrier from liability, must be such as no reasonable degree of human skill and foresight could guard against: *Palmer* v. *Delaware etc. Canal Co.*, 120 N. Y. 170; 17 Am. St. Rep. 629, and note. Railroads should provide safe road-beds, the ties should be sound, and the rails strong and securely laid: *McFee* v. *Vicksburg etc. R. R. Co.*, 42 La. Ann. 790; *Gulf etc. R. R. Co.* v. *Smith*, 74 Tex. 276; *Donnegan* v. *Erhardt*, 119 N. Y. 468.

CARRIERS OF PASSENGERS — NEGLIGENCE — BURDEN OF PROOF. — The occurrence of an accident to a passenger is *prima facie* evidence of negligence,

throwing upon the carrier the *onus* of showing want of negligence: *Philadelphia etc. R. R. Co.* v. *Anderson*, 72 Md. 519; 20 Am. St. Rep. 483, and extended note. This seems to be the general rule, but see *Witting* v. *St. Louis etc. R'y Co.*, 101 Mo. 631; 20 Am. St. Rep. 631, and note. Negligence is presumed from the fact of a collision: *Graham* v. *Burlington etc. R'y Co.*, 39 Minn. 81. From the mere fact that an accident occurred and a passenger was injured, a presumption of negligence arises: *Farley* v. *Philadelphia etc. Trac. Co.*, 132 Pa. St. 58; *Mitchell* v. *Southern P. R. R. Co.*, 87 Cal. 62; *Arkansas etc. R'y Co.* v. *Canman*, 52 Ark. 517.

STATE *v.* LACLEDE GASLIGHT COMPANY.

[102 MISSOURI, 472.]

MUNICIPAL CORPORATIONS — ORDINANCE GRANTING GAS PRIVILEGES. — A city ordinance granting to a gas company, its successors and assigns, the privilege of furnishing gas to a city and to consumers for a certain period, and providing that such company may transfer all its rights, property, and franchises to any organized gas company within the state which will file a written acceptance of the ordinance and give a bond to perform all the agreements of the original company, is not void on the ground that the time named therein extends beyond the termination of the original company's existence.

MUNICIPAL CORPORATION — POWER TO CONVEY. — The capacity of a municipal corporation to take, and its power to convey, property of all kinds differs in no essential particular from the capacity and power of a natural person under like circumstances.

CONTRACTS — ENFORCEMENT OF, BY THIRD PARTY. — A contract may be enforced when entered into for the benefit of a third party, although he is not named.

MUNICIPAL CORPORATIONS — ORDINANCE GRANTING GAS PRIVILEGES AND FIXING PRICE. — Where a city passes an ordinance granting to a gas company the privilege of manufacturing and supplying gas, and also fixing the maximum price thereof, upon the acceptance of the ordinance by the gas company the city cannot subsequently reduce the price of gas below that fixed by the ordinance.

CONTRACT — STATUTE — WHAT IMPLIED IN. — Whatever the law necessarily implies in a contract or in a statute is as much a part thereof as if expressly stated therein.

CORPORATIONS — CONTRACT RIGHTS UNDER CHARTER — REGULATION OF PRICE OF GAS. — A charter granted by the state to a gas company, giving it the power to make and vend gas, constitutes a contract between it and the state, and carries with it the right to fix the price of gas thus made and sold; and after it has accepted the terms of an ordinance passed by a city fixing the price of gas supplied to it by such company, the price thus fixed cannot be reduced by legislative action, state or municipal.

POLICE POWER — REGULATION OF PRICE OF GAS — CONTRACT RIGHTS UNDER CHARTER. — Where a state has granted a company, by charter, the right to make and vend gas, it has the right to fix the price of gas sold by it, and the subsequent regulation of such price by the state or by municipalities is not an exercise of police power which cannot be abridged by contract.

L. Bell, for the relator.

Boyle, Adams, and McKeighan, G. A. Madill, Gibson, Bond, and Gibson, for the respondent.

SHERWOOD, J. This, an original proceeding, has been instituted in this court to compel by our mandate the respondent to comply with the provisions of city ordinance 15482, which went into effect March 31, 1890, by supplying gas to consumers at a sum not exceeding ninety or ninety-five cents per one thousand cubic feet.

The respondent has made return to the alternative writ, and a general statutory demurrer has been filed thereto, to the effect that it contains no facts to constitute a defense to the relief sought.

As the pleadings and the various statutes and ordinances relating to the subject-matter of this litigation are contained in the statement of the relator, which will, in substance, preface this opinion, they will only be briefly referred to as occasion may require.

By virtue of, and in compliance with, ordinance 13494, approved January 30, 1886, and within ten days prescribed therein, the St. Louis Gaslight Company filed with the city register of the city of St. Louis its written acceptance of the ordinance mentioned, and bond as in section 12 of said ordinance is prescribed, and proceeded to do all that said ordinance required by reducing the price of gas to consumers, and by reducing the price of supplying, cleaning, lighting, and extinguishing the public lamps of the city to the extent of seven dollars each per annum. This waiver and rebate by the company in the time between the acceptance of the ordinance, to wit, in 1886, up to the time of the expiration of the corporate life of the original company, to wit, January 1, 1890, amounted to the sum $1,574,244, etc., which otherwise that company would have been entitled to, and would have received. The ordinance thus accepted by the St. Louis Gaslight Company embraced in its terms not only that company, but its successors and assigns, and was made in behalf of said company and it successors and assigns, and extended the time for lighting the city, etc., from the expiration of the original period, to wit, January 1, 1890, to the corresponding period thirty years thereafter.

By sections 2 and 3 of that ordinance it was provided that, —

"Sec. 2. The price of gas to consumers in said district until January 1, 1890, shall not exceed $1.50 for each one thousand cubic feet of gas sold to them, and from January 1, 1890, to January 1, 1920, it shall not exceed $1.25 for each one thousand cubic feet of gas sold to them.

"Sec. 3. The said St. Louis Gaslight Company and its successors and assigns will grant to consumers a reduction of five per cent on each one thousand cubic feet of gas sold to them after January 1, 1890, from the price above named on all bills paid within five days after presentation, or the net price of $1.18¾ per thousand cubic feet of gas paid for within said time."

Section 13 of the ordinance confers power upon the St. Louis Gaslight Company, after its acceptance as aforesaid, to transfer all its rights, privileges, property, franchises, etc., conferred upon it by this ordinance, to any other gaslight company organized under the laws of this state, and provided that such corporation receiving said transfer shall be subject to all conditions and perform all agreements required of the original company by the ordinance, and that such transferee should, within twenty days after receiving such transfer, file the written acceptance and give the bond required by section 12 aforesaid. On the 24th of December, 1889, the St. Louis Gaslight Company, for value received, sold to the respondent company all its rights, property, privileges, franchises, etc., and within twenty days thereafter the latter company filed its written acceptance of the provisions of the ordinance as required by section 12, and gave bond, etc.

After these things had occurred, the ordinance first aforesaid was passed, whereby the price of gas was cut down from $1.25, or the net price of $1.18¾ per thousand cubic feet as by section 3 provided, to ninety cents for said quantity of gas.

There can be no doubt that the foregoing facts and transactions, which the demurrer admits took place, constituted contractual relations between the city and the St. Louis Gaslight Company, and between the two gaslight companies, as well as between the city and the respondent. Nor, speaking in a general way, can there be any more doubt of the capacity of the respective parties thus to contract. Such power the city certainly possessed, and the gaslight companies possessed the like powers given by their respective charters, as has been heretofore affirmed by this court in two instances: *City of St. Louis* v. *St. Louis Gaslight Co.*, 70 Mo. 69; *St. Louis Gaslight Co.* v. *City of St. Louis*, 86 Mo. 495.

The points at issue, however, between the contestants in the present litigation are four in number: 1. That the St. Louis Gaslight Company had no power to contract with the city as to matters necessarily extending beyond the limit of its chartered existence; 2. That ordinance 13494 does not exempt the respondent company from regulations by the city of the price of gas; 3. That there is nothing in the charter of the respondent company which forbids the reduction by the city of the price of gas after the first day of January, 1890; and 4. That even if that ordinance and the acceptance thereof may be regarded as constituting a contract, yet that such contract, if it has the effect claimed for it by the respondent, was beyond the power of the city to make, being nothing less than a futile attempt to barter away a police governmental power affecting the health and welfare of the people of St. Louis. Of these points in the order indicated:—

1. As to the first. The capacity of a corporation to take, and its power to convey, property, real, personal, or mixed, differs in no essential particular from the capacity and power of natural persons in like circumstances: Morawetz on Private Corporations, secs. 330, 1031, and cases cited; Angell and Ames on Corporations, 11th ed., sec. 195, and cases cited. To deny this proposition would be to deny to an individual the capacity to take title in fee, because life's narrow span would not admit of his perpetual enjoyment of the title thus taken.

But this is not the only answer to this objection; the contract in question was entered into, not only with the St. Louis Gaslight Company, but with its "successors and assigns," whoever they might be, and the ordinance under consideration clearly contemplates that all rights granted to the original company would be by that company granted to another company, whose longer lease of corporate life would enable it to perform the contract and fulfill its various conditions.

That a contract may be enforced when entered into for the benefit of a third party, though not named, is well settled: *Meyer* v. *Lowell*, 44 Mo. 328, and cases cited; *Rogers* v. *Gosnell*, 58 Mo. 589; *Cress* v. *Blodgett*, 64 Mo. 449. But aside from the foregoing considerations, the respondent company, having purchased all the rights, property, etc., of the original company, and having, in compliance with section 13 of the ordinance, filed its written acceptance, and given bond to the city, thenceforth the contract became a contract with the transferee.

2. The second point for discussion presents no greater obstacle to a ready determination than the one just considered. Sections 2 and 3 of the ordinance, when considered together, show that while the price of gas was not to exceed $1.25 from January 1, 1890, to January 1, 1920, yet that up to that sum was a perfectly legitimate price to charge for the production of gas. If the contention of relator is to prevail, then it would have been but an idle ceremony to have inserted in the ordinance any maximum price at all, since, according to that contention, the city had *carte blanche* to insert, at her pleasure, any figure beneath the maximum, and to compel the respondent to accept it. But this would have been tantamount to making a contract where one party dictates the price, something which certainly seems at variance with all of our preconceived ideas as to the fundamentals of a contract.

With equal propriety a payee in a promissory note payable on or before a period of six months after its date might contend that this was only the maximum of time in which the payor had to pay, and that as there was nothing in the note "prohibiting" payment before the ultimate date, that therefore it would be in the "discretion" of the payee to demand payment at an earlier period. We are not of the opinion that the ordinance will bear any such unwarrantable construction as relator desires us to place upon it. This is a case where "affirmative specification excludes implication": *Maguire* v. *State Savings Ass'n*, 62 Mo. 346, and cases cited; Broom's Legal Maxims, 8th ed., 652, 667.

Counsel for relator claims that on this point the rights of the city and of the respondent company, "under the ordinance, are reciprocal." If so, then, manifestly, the respondent would have as much right to charge above the price mentioned as would the city to compel the acceptance of a sum below it; otherwise there could be no reciprocity. But in addition to the views just expressed on this point, section 3 fixes an absolute or net price of $1.18¾ for the gas, provided prompt payment be made therefor. The literal meaning of the word "net" forbids all thought or theory of deductions; e. g., "net profit," "net weight," "net income."

3. The third point at issue, as already stated, presents the question whether the charter of the respondent company, granted by the state, contains such features of a contractual nature as forbid and prevent any interference therewith either by the state government or by any municipality representing

the authority of that government. The respondent company exists by virtue of a special charter granted March 2, 1857, as amended by an act approved March 26, 1868.

By the provisions of section 1 of the act of 1857, the respondent has power to contract and be contracted with, without condition or limitation.

By the provisions of section 5 of said act of 1857, the respondent has power, throughout a certain portion of the corporate limits of the city of St. Louis, to lay its pipes and fixtures, and to make and vend gas, with no condition or limitation as to price to be charged therefor, and to have and exercise all other powers necessary to execute and carry out the privileges and powers granted to respondent by the act.

By the provisions of section 7 of the act of 1857, any interference with the respondent in the exercise of the privileges granted to it by that act subjects the offender to a liability to the respondent of one thousand dollars.

By the provisions of section 8 of said act of 1857, the respondent and its charter are expressly exempted from the operation of sections 6 and 7 of article 1 of the act entitled "An act concerning corporations," approved November 23, 1855.

Said section 6 is as follows: "If any corporation hereafter created by the legislature shall not organize and commence the transaction of its business within one year from the date of its incorporation, its corporate powers shall cease": Rev. Stats. 1855, c. 34, art. 1, sec. 6.

Said section 7 is as follows: "The charter of every corporation that shall hereafter be granted by the legislature shall be subject to alteration, suspension, and repeal, in the discretion of the legislature": Rev. Stats. 1855, c. 34, art. 1, sec. 7.

By the first section of the said act approved March 26, 1868, the rights, privileges, and franchises granted to respondent in a portion of the city of St. Louis by section 5 of the act of 1857 were extended throughout the entire corporate limits of the city.

The fifth section of the original act incorporating the respondent gave it ample powers of contracting with the city for making and vending gas, etc., and the amendatory act made its franchises co-extensive with the boundaries of the city. This point was, inferentially, thus ruled in *City of St. Louis* v. *St. Louis Gaslight Co.*, 70 Mo. 69, and thus ruled directly in a later case: *St. Louis Gaslight Co.* v. *City of St. Louis*, 86 Mo. 495.

It is not open to doubt or dispute that this power to make and vend gas carries with it as an inevitable incident the right to fix the price of the gas thus made and sold. No other conclusion can be drawn from the premises. A sale implies a price. It would be but the granting of a barren right indeed which would confer power to incur expense and perform labor, and yet deny the power to fix and to reap the fruit of that labor, to wit, the price. Whatsoever the law necessarily implies in a statute or in a contract is as much part and parcel thereof as if expressly stated therein. So that by the terms of the charter of the respondent company its right to fix the price of its product was as much a part of its charter as if it had been, in terms, set forth in section 5 of the original act of incorporation.

But if a price had thus been set forth, no one familiar with constitutional principles but would at once deny that the right to contract for the sale of gas at such price could anywise be impaired. For reasons already given, the result of the contract between the state and the respondent company was the same as if the state, in granting the charter, had set a price at which the respondent might make and vend gas, and then declared that the powers thus granted should be exempt from subsequent "alteration, suspension, or repeal" by the legislature.

The authorities cited both from our own reports as well as elsewhere by respondent's counsel abundantly exemplify this familiar doctrine. It is quite unnecessary to cite or to quote them.

4. But it is claimed by relator that the power to regulate the price of gas, having been granted by the state to the city in 1870, was a police governmental power which could not be bartered away by the government, state or local. If this position be correct, then, of course, the charter of the respondent company was valueless when it came from the hands of its grantor, the state, because it possessed none of the elements of a contract about it. In short, it was *ultra vires* the state to make such a grant.

It is not to be doubted that there is a limit to the power of the legislature to tie the hands of subsequent legislatures in respect to the exercise of what is termed the "police power." Thus it is said: "No legislature can bargain away the public health or the public morals": *Stone* v. *Mississippi*, 101 U. S. 814.

But certainly there is a limit in this regard over which legislatures and municipalities cannot pass; they cannot, in the exercise of assumed police powers, violate charter contracts and overthrow vested rights. On this subject Judge Cooley aptly says: "The limit to the exercise of the police power in these cases must be this: The regulations must have reference to the comfort, safety, or welfare of society; they must not be in conflict with any of the provisions of the charter; and they must not, under pretense of regulation, take from the corporation any of the essential rights and privileges which the charter confers. In short, they must be police regulations in fact, and not amendments of the charter in curtailment of the corporate franchise": Cooley's Constitutional Limitations, 5th ed., 712.

In a recent case in the supreme court of the United States,—a case presenting many features in common with the one at bar,—it was laid down that charters granted at different times to two gas companies, with exclusive privileges, were contracts which could not be impaired by subsequent state legislation, nor by an after-adopted clause in the constitution of Louisiana forbidding monopolies. In that case a similar objection was made as now taken here, as to the legislature having transcended its powers in granting such charters, but the objection was overruled: *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650.

As a summary of our views herein, we consequently hold,—1. That the charter of the respondent company was a contract between it and the state which authorized it to fix the price of gas which it should manufacture, and which price could not be diminished by subsequent legislative action, whether state or municipal; 2. That ordinance 13494, when accepted as therein provided by the St. Louis Gaslight Company, constituted a valid contract between that company and the city of St. Louis; 3. That by the subsequent transfer by the original company of its property rights, franchise, etc., to the respondent company, and by written acceptance, etc., of ordinance 13494 by that company, a like valid contract was formed between the city and that company; 4. Which contract was beyond the power of the state to impair or in any manner affect by ordinance 15482.

We therefore deny the peremptory writ.

BARCLAY, J. As to the proper construction and effect of ordinance 13494, my concurrence is given to what is said in

the foregoing opinion in the first and second paragraphs therein indicated.

On the other points discussed, it seems to me unnecessary at this time to express an opinion.

CONTRACTS — CONSTRUCTION — WHAT MAY BE IMPLIED. — Whatever may be fairly implied from the terms or language of a contract is, in the judgment of the law, contained in it: *Hutchinson* v. *Lord*, 1 Wis. 286; 60 Am. Dec. 381. This rule applies equally as well in the interpretation of statutes: *Harrison* v. *Berkley*, 1 Strob. 525; 47 Am. Dec. 578; *Hickok* v. *Hine*, 23 Ohio St. 523; 13 Am. Rep. 255; and charters: *Village of Carthage* v. *Frederick*, 122 N. Y. 268; 19 Am. St. Rep. 490, and note.

CONTRACTS FOR BENEFIT OF THIRD PERSON — PARTY PLAINTIFF. — If one person makes a promise for the benefit of a third person, the latter may sue upon it: *Dearborn* v. *Parks*, 5 Greenl. 81; 17 Am. Dec. 206; *Schermerhorn* v. *Vanderheyden*, 1 Johns. 139; 3 Am. Dec. 304, and note 305, 306.

MUNICIPAL CORPORATIONS — GRANTING EXCLUSIVE PRIVILEGES. — Grants of exclusive privileges are not favored at law: *Freeport Water W. Co.* v. *Prager*, 129 Pa. St. 605. A city cannot use its powers to create monopolies for the benefit of private individuals: *State* v. *Pendergrass*, 106 N. C. 664; but the courts should preserve contracts inviolable, rather than to destroy a monopoly: *Citizens' W. Co.* v. *Bridgeport H. Co.*, 55 Conn. 1. Where it is the duty of a municipality to furnish gas to its inhabitants, and it has legislative authority to erect gas-works, it, of necessity, has the implied power to grant to a corporation the exclusive right to furnish gas and use its streets for that purpose for a certain number of years: *City of Newport* v. *Newport L. Co.*, 84 Ky. 166. The grant by a city to a gas company of the exclusive privilege of lighting the city with gas will not prevent the city from contracting with an electric-light company for lighting the city by electricity: *Gas Co.* v. *Parkersburg*, 30 W. Va. 435. And substantially to the same effect is *Teachout* v. *Des Moines etc. St. R'y Co.*, 75 Iowa, 722. Compare *Spring Valley Water Works* v. *San Francisco*, 82 Cal. 286, 16 Am. St. Rep. 116, as to the power of courts to interfere with the action of supervisors in fixing water rates.

MUNICIPAL CORPORATIONS — CONTRACTS. — A municipal corporation acts as a private corporation when it enters into contracts with its inhabitants, and is subject to the same duties, liabilities, and disabilities as individuals. It cannot, therefore, impair the obligation of contracts so made: *Western S. F. Soc.* v. *Philadelphia*, 31 Pa. St. 175; 72 Am. Dec. 730, and note. Compare *East St. Louis* v. *East St. Louis Gas Light etc. Co.*, 98 Ill. 415; 38 Am. Rep. 97; *Citizens' W. Co.* v. *Bridgeport H. Co.*, 55 Conn. 1.

MAGOFFIN *v.* MISSOURI PACIFIC RAILWAY CO.

[102 MISSOURI, 540.]

PRACTICE ON FACTS ADMITTED MAKING PRIMA FACIE CASE. — Where facts admitted by stipulation make a *prima facie* case of negligence on the part of defendant, and are unrebutted and undisputed by him, it is the duty of the court to direct the jury to find a verdict for the plaintiff.

CARRIER OF PASSENGERS — POSTAL-CLERK ENTITLED TO RIGHTS OF PASSENGER. — A postal-clerk on board a railway train by virtue of a contract made with the United States government for the transportation of the mails and of postal-clerks is entitled to all the rights of a passenger in case of injury to him arising from the negligence of the company. Privity of contract is not essential to the liability of the carrier for such injury.

Adams and Buckner, for the appellant.

Warner, Dean, and Hagerman, for the respondent.

SHERWOOD, P. J. Action for five thousand dollars damages for the death of plaintiff's husband, caused by a collision of two of the trains of the defendant.

The cause was tried on this stipulation: "1. Elijah H. Magoffin, the husband of the plaintiff, was killed by a collision between two trains of cars of the defendant on the line of the defendant's railroad between Greenwood, Jackson County, Missouri, and Pleasant Hill, Cass County, Missouri, on the morning of November 27, 1886. "2. At the time of the death of said Magoffin, he was in the employ of the United States of America as a postal-clerk, and was in one of the mail-cars attached to one of the trains of the defendant, and was *en route* from St. Louis, Missouri, to Kansas City, Missouri; and said passenger train and a certain other train belonging to the defendant, and running on its road, collided at the time and place aforesaid, and in the collision the said Elijah H. Magoffin was instantly killed. The said Elijah H. Magoffin paid no fare for his transportation, but was on the postal-car as an employee of the post-office department of the government of the United States, with which the defendant had a contract for the transportation of mails and postal-clerks."

To further sustain the issues on her part, plaintiff testified, substantially, as follows: That she was thirty-seven years old; had been married to deceased fifteen years; had four children, the oldest fourteen, and the youngest two years of age; that her husband, at the time of his death, was employed as a postal-clerk by the United States government, and had been so

employed over a year, and received a salary of seventy-five dollars a month; that her husband left no fortune, and all they had to depend upon was his salary; that there was no provision left her by her husband; that they had a few hundred dollars, but they had to depend on his (her husband's) salary for a living; that her husband was killed November 27, 1886.

This was all the testimony offered. Whereupon the plaintiff, by leave of court, dismissed as to the second count of the petition. Whereupon, at the instance of plaintiff, the court instructed the jury as follows: "1. The court instructs the jury that, under the undisputed evidence in the cause, the plaintiff is entitled to recover, and the verdict of the jury should be in her favor for five thousand dollars."

The court refused instructions in the nature of a demurrer to the evidence, and looking to a recovery of a less sum than five thousand dollars. The jury found for the plaintiff in that sum; hence this appeal. The answer was simply a general denial.

The stipulation already set forth is sufficient, in and of itself, to shift the burden of proof from the shoulders of the plaintiff to those of the defendant, since the facts admitted therein made out a case of *prima facie* negligence on the part of the defendant; and this being unrebutted and undisputed on the part of the latter, it was the duty of the court to direct the jury to find a verdict for the plaintiff; there was no other course left for the court to pursue. This position is supported both by reason and authority. And it is equally well settled that the deceased husband occupied as advantageous a position as a passenger, if he was not in fact one. He certainly was not an intruder; he was there by virtue of a contract made with the United States government for the transportation of the mails and postal-clerks; and he was one of those clerks. The fact that the government had contracted for his transportation along with the mails, to take charge thereof, did not make him any the less a passenger nor diminish the duty which the defendant owed him to carry him safely. Privity of contract is non-essential in such cases.

The case of *Pennsylvania R. R. Co.* v. *Price*, 96 Pa. St. 256, is not at all analogous to the present one; for there a special statute controlled, — a statute which excluded postal-agents from the class designated as passengers. The same may be said of *Price* v. *Pennsylvania R. R. Co.*, 113 U. S. 218, where the same statute was involved.

Nor can it be doubted that plaintiff was entitled to a recovery of five thousand dollars for the death of her husband, under the provisions of section 2 of the damage act: *Carroll* v. *Missouri R'y Co.*, 88 Mo. 241; 57 Am. Rep. 382; *Sullivan* v. *Missouri Pac. R'y Co.*, 97 Mo. 113.

The result is, that we affirm the judgment.

NEGLIGENCE — WHEN A QUESTION OF LAW. — If from the undisputed evidence only one conclusion can reasonably be drawn, negligence is a question of law: *Mathews* v. *Cedar Rapids*, 80 Iowa, 459; 20 Am. St. Rep. 436, and note.

CARRIERS — PASSENGERS — RIGHTS OF EXPRESS MESSENGERS. — A railway company is liable for its negligence resulting in the death of an express messenger carried on its road free under a contract between it and the express company: *Brewer* v. *New York etc. R. R. Co.*, 124 N. Y. 59; 21 Am. St. Rep. 647. But if he agrees to assume all risks of injury and to hold the company harmless therefor, the agreement is not invalid as against public policy: *Bates* v. *Old Colony R. R. Co.*, 147 Mass. 255.

FURNISH *v.* MISSOURI PACIFIC RAILWAY COMPANY.

[102 MISSOURI, 669.]

NEGLIGENCE — RIGHT OF HUSBAND TO RECOVER FOR LOSS OF SOCIETY OF WIFE — BASIS OF RECOVERY. — A husband is entitled to recover compensation for the loss of the society of his wife, resulting from the negligence of a third party, and the word "society," in this connection, means such capabilities for usefulness, aid, and comfort as the wife possessed at the time of the injury. Any diminution of those capacities resulting from the negligence of a third person constitutes a just basis for an award of compensatory damages therefor.

NEGLIGENCE — LOSS OF SOCIETY OF WIFE — NECESSITY OF DIRECT PROOF OF VALUE. — In an action by a husband to recover for the loss of the society of his wife, resulting from the negligence of a third party, direct proof of the value of such loss is not required; for upon the establishment of the fact of such loss, the assessment of reasonable compensation therefor necessarily rests in the discretion of the court or jury trying the fact.

ACTION by W. S. Furnish to recover damages sustained by him in expense incurred in medical attention and nursing and in being deprived of the companionship and society of his wife, who sustained injuries resulting from the negligence of defendant while she was a passenger on one of its trains under the circumstances set forth in *Furnish* v. *Missouri Pacific R'y Co.*, 102 Mo. 438; *ante*, p. 781. Judgment for plaintiff for five thousand dollars, and defendant appeals.

Adams and Buckner, for the appellant.

Gates and Wallace, for the respondent.

BARCLAY, J. The evidence and instructions in this action relating to the issue of defendant's negligence toward Mrs. Furnish as a passenger upon its railway, are in all material particulars identical with the evidence and instructions discussed in *Furnish* v. *Missouri Pac. R'y Co.*, 102 Mo. 438; *ante*, p. 781. So far as concerns that branch of this case, it is unnecessary to reiterate the rulings then announced.

Several other errors are now assigned, however, involving points not presented in that action, but peculiar to this.

2. Defendant claims that the trial court erred by instructing the jury to allow plaintiff such sum as the evidence showed would compensate him for the "loss of society and companionship of his wife."

The objection is placed upon two grounds. It is first asserted that there was no loss to plaintiff of the society or companionship of his wife, because, though injured, she was yet with him, and he therefore had the benefit of her society. But the answer to that contention is, that as her husband he was entitled to her society as she was when the negligence of defendant impaired her strength, her health, and her usefulness as a helpmate. Though he may still be with her, and her companionship may be even more dear to him since her injury, because of her very helplessness and need of his attention, yet that does not diminish the legal wrong he has suffered from the acts which produced that condition. He is entitled to be compensated for such loss of her society as resulted from the negligence alleged.

By the term "society," in this connection, is meant such capacities for usefulness, aid, and comfort as a wife which she possessed at the time of the injury. Any diminution of those capacities, by the acts or negligent omissions of defendant, constituted a just basis for an award of compensatory damages therefor: *Maxson* v. *Delaware etc. R. R. Co.* (1889), 112 N. Y. 559; *Ainley* v. *Manhattan R'y Co.* (1888), 47 Hun, 206; *Jones* v. *Utica etc. R. R. Co.* (1886), 40 Hun, 349; *Blair* v. *Chicago etc. R. R. Co.* (1883), 89 Mo. 334; *Berger* v. *Jacobs* (1870), 21 Mich. 215; *Cregin* v. *Brooklyn C. R. R. Co.* (1881), 88 N. Y. 595; 38 Am. Rep. 474.

Next it is urged that, as no evidence was offered of the value of the wife's society, the instruction should not have

been given. To this it may be said that the nature of the subject does not admit of direct proof of value, and that when the fact of loss of society is established by testimony, the assessment of reasonable compensation therefor must necessarily be committed to the sound discretion and judgment of the triers of fact.

The trial court, by the instruction numbered 9, excluded a recovery of any damages for loss of services of the wife, presumably because the court did not consider the petition as asserting any specific claim therefor. Whether this ruling was correct or not need not be discussed, as the plaintiff makes no complaint thereof. But plaintiff's loss of society and companionship of his wife was expressly counted upon, and submitted properly to the jury by the instruction numbered 10, as a ground of recovery.

8. It is further contended that the damages are excessive. Plaintiff expended over eight hundred dollars in the necessary treatment and care of his wife to the time of the trial, and it appears from the evidence that ever since the accident she has been totally disabled from doing any household duty, or being of any aid or assistance to plaintiff as a wife.

In view of the facts of this branch of the case (outlined in the statement preceding this opinion), we are not prepared to say that the amount of the verdict is such as justifies the interference of this court.

No other errors in the record have been suggested, and finding the assignments above discussed untenable, it follows that the judgment should be affirmed. It is so ordered, with the consent of all the judges of this division

CARRIERS — NEGLIGENCE — DAMAGES — RIGHT TO RECOVER FOR LOSS OF SOCIETY. — Where a decedent has left a mother or wife, they may recover for loss of his society and comfort: *Monro* v. *Pacific etc. Co.*, 84 Cal. 515; 18 Am. St. Rep. 248, and note. It is not necessary that a husband should prove special damage occasioned by the negligent killing of his wife: *Delaware etc. R'y Co.* v. *Jones*, 128 Pa. St. 303.

CASES

IN THE

COURT OF APPEALS

OF

NEW YORK.

WOODEN *v.* WESTERN NEW YORK AND PENNSYLVANIA RAILROAD COMPANY.

[126 NEW YORK, 10.]

ACTION TO RECOVER FOR INJURIES RESULTING IN DEATH, RECEIVED IN FOREIGN STATE, WHEN MAINTAINABLE. — An action to recover damages for injuries received in another state, resulting in the death of the person injured, can be maintained in the state of New York only upon proof that the statutes of such other state give the right of action, and that they are similar to the New York statutes. The statutes of the two states need not, however, be identical in their terms or precisely alike; it is sufficient if they are of similar import and character, founded upon the same general principle, and possessing the same general attributes.

STATUTES GIVING RIGHT OF ACTION FOR INJURY RESULTING IN DEATH NOT DISSIMILAR WHEN. — Statutes of two different states, which give a right of action to recover damages for injuries resulting in death, are not dissimilar because by one statute the right of action is given to the widow, while by the other, it is given to the executor or administrator. Although the formal parties are different, the substantial and real parties are identical.

ACTION TO RECOVER FOR DEATH OF HUSBAND PROPERLY BROUGHT BY WIDOW, AS SUCH, WHEN. — Where the statute of Pennsylvania gives to a widow, in her own right, and as trustee for the children, a right to recover for the death of her husband, an action brought by her in New York to recover for such death, resulting from an injury received in Pennsylvania, is properly brought by her as widow, and not as administratrix, although the New York statute gives the right of action in similar cases to the executor or administrator.

DOMESTIC CORPORATION ENTITLED TO BENEFIT OF RESTRICTION UPON AMOUNT OF DAMAGES RECOVERABLE AGAINST IT. — Where a plaintiff sues in New York a corporation formed under the laws of that state, to recover damages for the death of her husband, resulting from injuries received in Pennsylvania, the defendant is entitled to the benefit of the restric-

tion upon the amount of the damages recoverable under the New York law, although the Pennsylvania statute contains no such restriction. A domestic corporation has the right to be protected by the remedial limitations of its jurisdiction.

ACTION to recover damages for the alleged negligent killing of plaintiff's husband by the defendant. The facts are stated in the opinion.

John G. Milburn, for the appellant.

Harlow C. Curtiss, for the respondent.

FINCH, J. This appeal is from an interlocutory judgment overruling a demurrer and determining that the complaint assailed stated a good cause of action. That pleading alleged that the plaintiff was and is a resident of this state, and the defendant a corporation created and existing under our laws. The contest thus is between a resident individual and a domestic corporation. The latter owned and operated a line of railroad extending beyond our boundaries into the adjoining state of Pennsylvania, and the complaint alleged that in that state the plaintiff's husband was killed by the negligence of the defendant company. The complaint further averred that the statutes of that state gave a right of action for the injury sustained by the widow and children; that the remedy could be enforced in the name of the former as plaintiff, but for her own benefit and that of the children; and that such statute was of similar import to that existing in our own jurisdiction. Judgment was thereupon demanded for damages in the sum of twenty thousand dollars.

The demurrer interposed raised two objections: 1. That the statutes of the two states were not similar, but different; and 2. That the action could not be maintained here in the name of the widow, but only in that of an executor or administrator of the deceased; and the final result sought to be established was, that the widow could not maintain an action in this state, because that is contrary to our statute, and that the administratrix could not, because that is contrary to the Pennsylvania statute; and so there is no remedy whatever in our jurisdiction.

Certain propositions essential to the inquiry before us have been explicitly determined in *McDonald* v. *Mallory*, 77 N. Y. 546, 33 Am. Rep. 664, and need no other citation for their support. That case held that the liability of a person for his acts, whether wrongful or negligent, depends in general upon

the law of the place in which the acts were committed; that actions for injuries to the person in another state are sustained here without proof of the *lex loci* because they are permitted by the common law, which is presumed to exist in the foreign state; that such presumption does not arise where the right of action depends upon a statute which confers it; and that in such case the action can only be maintained here by proof that the statutes of the state in which the injury occurred give the right of action and are similar to our own.

Upon the question of similarity we have also held that the two statutes need not be identical in their terms or precisely alike; but it is enough if they are of similar import and character, founded upon the same principle and possessing the same general attributes: *Leonard* v. *Columbia Steam Nav. Co.*, 84 N. Y. 53; 38 Am. Rep. 491. It is quite evident that the two statutes are of similar import. They are founded upon the same principle, are aimed at the same evil, construct the same sort or kind of action, and give it for the benefit of the same class of individuals. In both, the utter failure of redress at common law, where the injury ended in death, was the injustice for which a remedy was enacted; and in both the new action was given for the benefit of those who had suffered an injury as the consequence of the wrong. This fundamental agreement, in the main and substantial characteristics of the two statutes, is not affected by the differences of detail which the demurrer points out.

The first is, that by the *lex loci* the proper person to bring this action, and the only person who can maintain it, is the widow, while by our law the right of action is given to the executor or administrator. But it is given to the latter, not in his broad, representative character, but solely as trustee, in a case like the present, for the widow and children: *Hegerich* v. *Keddie*, 99 N. Y. 267; 52 Am. Rep. 25. It is not a right which survives to the personal representatives, but a right created anew. The real parties in interest, those whose injury is redressed, whose right is vindicated, to whom all damages go, are one and the same in both forums. If the formal parties are different, the substantial and real parties are identical, and the difference in the trustee appointed by the law to represent their right is not such a difference as to bar our tribunals from their jurisdiction, or make the two statutes dissimilar under the rule.

It is claimed, however, that even in that event the right of

action accruing in the place of the transaction can only be enforced in our jurisdiction under our remedial forms, and so should have been brought by the plaintiff, not as widow, but as administratrix, to which office she had been appointed in this state. But it must not be forgotten that the cause of action sued upon is the cause of action given by the *lex loci*, and vindicated here and in our tribunals upon principles of comity: *Leonard* v. *Columbia Steam Nav. Co.*, 84 N. Y. 53; 38 Am. Rep. 491. That cause of action is given to the widow in her own right and as trustee for the children, and we open our courts to enforce it in favor of the party who has it, and not to establish a cause of action under our statute which never in fact arose. We refer to the *lex fori*, and measure it by and compare it with the *lex loci*, I think, for two reasons; one, that the party defendant may not be subjected to different and varying responsibilities, and the other, that we may know that we are not lending our tribunals to enforce a right which we do not recognize, and which is against our own public policy; and we do not refer to our law as creating the cause of action which we enforce. It is the cause of action created and arising in Pennsylvania which our tribunals vindicate upon principles of comity, and therefore must be prosecuted here in the name of the party to whom alone belongs the right of action; and that rule the courts of Pennsylvania enforce, where the cause of action arises here, by permitting it to be brought by the executor or administrator to whom by our law the right is given, although not by their own: *Usher* v. *West Jersey R. R. Co.*, 126 Pa. St. 207; 12 Am. St. Rep. 863.

But the second difference relied on is, that in Pennsylvania there is no restriction upon the amount of damages which may be recovered, while in our state they cannot exceed five thousand dollars. That restriction pertains to the remedy, rather than the right: *Dennick* v. *Central Railroad of New Jersey*, 103 U. S. 11. It is a limitation upon the discretion of the jury in fixing the amount of damages, but not upon the right of action or its inherent elements or character. The restriction indicates our public policy as to the extent of the remedy, and the plaintiff who chooses to avail herself of our remedial procedure must submit to our remedial limitations and be content with a judgment beyond which our courts cannot go. They cannot exceed it in a case arising here, and no principle of comity requires them to enlarge the remedy which the plaintiff voluntarily seeks. There may be, there very pos-

sibly is, an exception to that rule, resting upon its own peculiar reasons, in a case where the defendant is not, as here, a domestic corporation formed under our law, and so entitled to the benefit of our remedial limitations, but is a corporation of the state within whose jurisdiction the cause of action arose, and by whose law no restriction upon the amount of damages is permitted or enacted. We do not decide that question; but the same reasoning which would expose such a corporation to the law of its own jurisdiction would serve equally to justify the right of the domestic corporation to be protected by the remedial limitations of its jurisdiction. The difference between the two statutes, therefore, does not strictly affect the rule of damages, but rather the extent of damages; and that extent, as limited or unlimited, does not enter into any definition of the right enforced or the cause of action permitted to be prosecuted. And so the causes of action in the two forums are not thereby made dissimilar. These views lead to an affirmance of the interlocutory judgment.

The judgment should be affirmed, with costs, but with leave to the defendant to withdraw the demurrer and plead anew within twenty days after service of a copy of the judgment entered upon filing the *remittitur*, and upon payment of the costs of the action from the interposition of the demurrer to that date.

Judgment accordingly.

ACTIONS IN ONE STATE TO ENFORCE CAUSES OF ACTION CREATED BY THE STATUTE OF ANOTHER: See note to *Attrill* v. *Huntington*, 14 Am. St. Rep. 350-355; *Ash* v. *Baltimore etc. R. R. Co.*, 72 Md. 144; 20 Am. St. Rep. 461, and note; *Usher* v. *West Jersey R. R. Co.*, 126 Pa. St. 206; 12 Am. St. Rep. 862, and note.

CHAMBERLAIN *v.* DUNLOP.

[126 NEW YORK, 45.]

NOTICE, WHEN SUFFICIENT TO EXTEND TERM OF LEASE. — Where a lease for a term of five years contains a provision for an extension thereof for two years, upon the lessee's giving written notice to the lessor three months before the expiration of the original term of his desire to so extend it, a written notice served by the lessee as prescribed, and stating, in addition, that if the lessor chooses they would regard the lease as extended two years and a half, to which the lessor replies acknowledging the lessee's right to an extension for two years, but refusing to grant the extension for the extra six months, is sufficient to extend the term for the two years.

SURRENDER OF LEASE, WHAT IS NOT. — An original lease is not surrendered by the delivery to the lessee of a new lease of the same premises, which does not give to him the interest for which he contracted and which he thought he was acquiring, and where no entry is ever made under the new lease, the property thereby demised having been destroyed by fire before the time arrived at which by its terms it was to become operative.

PARTY MAKING CONTRACT IS PRESUMED TO INTEND TO BIND HIS EXECUTORS AND ADMINISTRATORS, unless it is of such a nature as to call for some personal quality of the testator, or is so worded as to plainly negative such a presumption. Where, therefore, a testator covenants to rebuild premises leased by him, in case of their destruction by fire, his executor will have power to perform such covenant; and in an action against the executor to recover damages for the breach of such covenant, a motion for a nonsuit on the ground that the executor had no power to rebuild, and no control over the heirs at law to make them rebuild, is properly denied. In such a case, whether the land is devised or descends to the heir, the executor is liable upon the covenant, and must pay the damages, if he have assets.

LESSEE MAY TESTIFY AS TO VALUE OF LEASE WHEN. — A lessee suing to recover damages for the breach of a covenant to rebuild, contained in his lease, may testify as to the value of the lease for the time he would have been in possession after the premises were rebuilt and before the lease expired.

ARCHITECT MAY TESTIFY AS TO TIME IN WHICH BUILDING COULD BE REBUILT without dangerous haste.

ACTION to recover damages for an alleged breach of contract to rebuild, contained in a lease executed to the plaintiff by Robert Dunlop, the defendant's testator. The facts are sufficiently stated in the opinion.

E. H. Burdick, for the appellant.

Isaac Lawson, for the respondent.

PECKHAM, J. None of the grounds argued by the counsel for defendant is sufficient to call for a reversal of this judgment.

1. The lease was properly extended in the manner provided for by its terms, and was recognized as a valid and existing lease up to the death of the testator, at which time nearly one half of the extended period had expired. The lease provided for an extension of its term by two years, provided the lessee, three months before the expiration of the original five years, gave a written notice to the lessor of his desire to extend the lease for that further period. This the lessee did. Because he made a suggestion in that notice that if the lessor chose they would regard the lease as extended two years and a half had no bearing upon the sufficiency of the written notice, and

the refusal of the lessor to grant the extra six months' extension acknowledged the right of the lessee to the two years provided for by the lease itself.

2. The lessee of the original lease never, either in fact or in law, surrendered it by reason of what took place in regard to the execution of the lease by Wallace on the part of the heirs at law. The facts show there were a widow and several heirs at law, and that the widow had a right of dower in the premises, and that one of the heirs at law, at the time of the execution of the lease by Wallace as the agent of the heirs, was an infant. The lease purported to grant the interest of the heirs in the premises from the 1st of the coming May for five years. The evidence is uncontradicted that the agreement between plaintiff and Mr. Wallace was, that the plaintiff should have all the interest of all the parties in the premises for the five years, and that when the plaintiff executed the lease he had no personal knowledge as to who succeeded to the interest of Robert Dunlop, and he supposed that the lease covered the interest of all parties having an interest in the premises. It is also in proof and found by the referee that the widow had a right of dower in the premises. She did not sign the lease, and neither her interest nor the interest of the infant passed under it. The very day the lease was received, signed by Wallace as agent, the fire occurred. It is obvious that the plaintiff did not secure by the lease the interest which he had provided for by his agreement with Mr. Wallace. The dower of the widow was outstanding, and the interest of the infant was not affected by the lease. The original lease was not surrendered, for the reason that the new one did not give plaintiff the interest he contracted for, and which he thought he was acquiring. Under such facts, the cases hold there is no surrender: *Whitney* v. *Meyers*, 1 Duer, 271; *Schieffelin* v. *Carpenter*, 15 Wend. 405; *Coe* v. *Hobby*, 72 N. Y. 146; 28 Am. Rep. 120.

This is not the case of a lease by one tenant in common to a stranger, purporting to convey the whole interest in the land, and an entry by the lessee under it, and an acquiescence by all the other tenants in common. There was never a valid acceptance of the new lease. The agreement provided for the conveyance of the whole interest to the plaintiff, and the parties failed to convey all of such interest, and the plaintiff never accepted such lease with knowledge that it did not fulfill the terms of the agreement, and there was never any entry

under the lease, and before the time arrived at which the lease, by its terms, was to become operative, the property was not in existence, having been destroyed by fire. Hence the original lease remained in full force.

8. The defendant moved for a nonsuit upon the grounds, among others, that the executor had no power to rebuild, and no control over the heirs at law to make them rebuild; and also because on the death of the lessor the plaintiff paid rent to and held under the heirs at law, and not under the defendant executor. There is no finding by the referee as to the last alleged fact, and the evidence does not show that such is necessarily the fact. It rather shows the contrary. As to the first ground, that the executor had no power to rebuild, I think the authorities are clearly the other way.

The presumption is, that the party making a contract intends to bind his executors and administrators, unless the contract is of that nature which calls for some personal quality of the testator, or the words of the contract are such that it is plain no presumption of the kind can be indulged in: *Tremeere* v. *Morison*, 1 Bing. N. C. 89; *Reid* v. *Tenterden*, 4 Tyrw. 111; *Kernochan* v. *Murray*, 111 N. Y. 306; 7 Am. St. Rep. 744.

Where a party has entered into a contract to purchase real estate, and dies before it is conveyed to him, and before he has paid for it, his heir or devisee is entitled to have his executor pay for the realty out of the personal estate: *Brooms* v. *Monck*, 10 Ves. 596, 611; reargued, 619; *Livingston* v. *Newkirk*, 3 Johns. Ch. 312; *Wright* v. *Holbrook*, 32 N. Y. 587; 1 Sugden on Powers, 8th Am. ed., 293; 3 Redfield on Wills, 2d ed., 302, sec. 11.

The executor is not permitted to violate the contract of his testator after the latter's death: *Wentworth* v. *Cock*, 10 Ad. & E. 42; *Siboni* v. *Kirkman*, 1 Mees. & W. 419, remarks of Parke, B.

In *Quick* v. *Ludburrow*, 3 Bulst. 30, Lord Coke said that if a man be bound to build a house for another before such a time, and he which is bound dies before the time, his executors are bound to perform this. To same effect, *Tilney* v. *Norris*, 1 Ld. Raym. 553; *Tremeere* v. *Morison*, 1 Bing. N. C. 89; and *Reid* v. *Tenterden*, 4 Tyrw. 111.

If the testator devise his land to other parties, the executor still remains liable on the covenant of his testator. If the devisees do not permit the executor to build, the covenant is

broken, and it is the act of the devisor in devising his property thus that prevents the executor from fulfilling.

If the land descended to the heir, then the covenant still remains in force; and if it should be that the executor could not force the heir to permit the building, still the estate is liable on the covenant, and the executor must pay the damages if he have assets. The judgment here is only against him as executor, and is fully warranted in law.

4. The exceptions to the rulings of the referee in the admission or rejection of evidence are not tenable. The value of the lease for the time the plaintiff would have been in possession after the premises were rebuilt, and before the lease had expired, was properly testified to by the plaintiff. It was a matter of opinion to some extent, based upon facts, all of which he had testified to, and his experience and knowledge were more than that of any other person in regard to the very question which was asked. The evidence of Fleischman was properly admitted. He was an architect, and to some extent, therefore, familiar with building and the time it should take to do certain work, and with the fact whether the work could be done in a certain time without dangerous haste.

We are unable to find any fair reason for disturbing this judgment, and it should be affirmed, with costs.

WHERE AND HOW CONTRACT CONTINUES OBLIGATORY AND ENFORCEABLE AFTER DEATH OF CONTRACTOR. — It is a general rule of law that contracts bind, not only the parties thereto, but also their executors or administrators. The law presumes that the parties to a contract intend to bind their personal representatives, even when they are not named in the contract. Contracts are therefore, generally speaking, enforceable against the personal representatives of deceased parties thereto, to the extent of the assets which have come to their hands: 2 Parsons on Contracts, 531; Chitty on Contracts, 101; 1 Addison on Contracts, sec. 451; 3 Redfield on Wills, 302; Rawle on Covenants, sec. 312; *Broome* v. *Monck*, 10 Ves. 596; *Tremeere* v. *Morison*, 1 Bing. N. C. 89; *Reid* v. *Tenterden*, 4 Tyrw. 111; *Wentworth* v. *Cock*, 10 Ad. & E. 42; *Siboni* v. *Kirkman*, 1 Mees. & W. 419; *Farrow* v. *Wilson*, L. R. 4 Com. P. 744; *Smith* v. *Wilmington etc. Co.*, 83 Ill. 498; *Taylor* v. *Taylor*, 3 Bradf. 54; *Ferrin* v. *Myrick*, 41 N. Y. 315; *Kernochan* v. *Murray*, 111 N. Y. 306; 7 Am. St. Rep. 744; *McClure* v. *Gamble*, 27 Pa. St. 288; *Stumpf's Appeal*, 116 Pa. St. 33. A testator, by including his heirs, does not exclude his executors. The personal representatives are liable, even when the heirs are mentioned and when they are not mentioned: 1 Addison on Contracts, sec. 451; *McClure* v. *Gamble*, 27 Pa. St. 288. At common law, the heir was liable, in common with the personal representative, to the extent of the assets which had come to him by descent, upon all covenants under seal entered into by his ancestor, in which he was expressly named; but unless so named, he was not liable: 1 Addison on Contracts, sec. 447;

Rawle on Covenants, sec. 300; 2 Wait's Actions and Defenses, 396; *Tickner* v. *Harris*, 14 N. H. 272; 40 Am. Dec. 186.

NO DISTINCTION BETWEEN LIABILITY FOR BREACHES OF DECEDENT'S CONTRACTS BEFORE AND AFTER HIS DEATH. — The personal representatives of a decedent are liable in damages for all breaches of his contracts occurring prior to his death, and for all such breaches that occur subsequent to his death, except in those cases where his personal skill or taste is required in the execution of the contract: 1 Addison on Contracts, sec. 451; Chitty on Contracts, 101; 2 Parsons on Contracts, 533; Rawle on Covenants, sec. 312; 2 Wait's Actions and Defenses, 396; *Wells* v. *Fydell*, 10 East, 315; *Sibeni* v. *Kirkman*, 1 Mees. & W. 419; *Williams* v. *Burrell*, 1 Com. B. 402; *Smith* v. *Wilmington etc. Co.*, 83 Ill. 498; *Hovey* v. *Newton*, 11 Pick. 421; *McClure* v. *Gamble*, 27 Pa. St. 283; *Stumpf's Appeal*, 116 Pa. St. 33.

PERSONAL REPRESENTATIVE BOUND TO COMPLETE DECEDENT'S CONTRACT. — If a purchaser who has ordered goods dies before the time for their delivery, the executor or administrator must receive and pay for the goods, or he will be liable, to the extent of the assets in his hands, for the damages that may be sustained by reason of his refusal to complete the contract of the deceased: 1 Addison on Contracts, sec. 453; *Wentworth* v. *Cock*, 10 Ad. & E. 42; *Cooper* v. *Jarman*, L. R. 3 Eq. 98. And if a person contracts to build a house for another before a certain day, and dies before that day, his personal representatives must go on and finish the house, or they will be liable in damages for not completing the decedent's contract: *Quick* v. *Ludburrow*, 3 Bulst. 30; *Marshall* v. *Broadhurst*, 1 Cromp. & J. 405; *Collinson* v. *Lister*, 20 Beav. 356. And where a person contracts with a builder to erect a house on land belonging to him, and dies before the house is finished, his representative must have the house completed out of the personal estate of the deceased in the first instance: *Cooper* v. *Jarman*, L. R. 3 Eq. 98; *Riblett* v. *Wallis*, 1 Daly, 360; *Taylor* v. *Taylor*, 3 Bradf. 54. The personal representative of a deceased lessee is, in contemplation of law, the assignee of the term, and is liable as such upon all covenants running with the land, such as covenants to repair, to the extent of the assets in his hands; and it is no plea to an action on such a covenant that the premises yield no profit: 1 Addison on Contracts, sec. 448; *Tilney* v. *Norris*, 1 Ld. Raym. 553; *Tremeere* v. *Morison*, 1 Bing. N. C. 89; *Reid* v. *Tenterden*, 4 Tyrw. 111. But unless authorized by the will, a testator cannot carry on the trade of the testator, except to wind it up: *Collinson* v. *Lister*, 20 Beav. 356. The rights and liabilities of the heir and the personal representatives of a person deceased, in respect to any contracts entered into by him for the purchase or sale of real estate, are to be determined solely by the rights and liabilities of the contracting party as those questions stood at the time of his death: 3 Redfield on Wills, 302; *Broome* v. *Monck*, 10 Ves. 596.

CONTRACTS OF PERSONAL NATURE DETERMINED BY DEATH OF CONTRACTOR. — Where an executory contract is of a strictly personal nature, the death of the contractor absolutely determines the contract. In contracts of this kind it is an implied condition that the death of either party shall dissolve the contract. Examples of contracts of this class are: Contracts of authors to write books, of attorneys to render professional services, of physicians to cure particular diseases, of teachers to instruct pupils, and of masters to teach apprentices a trade or calling: 1 Parsons on Contracts, 131; 1 Addison on Contracts, sec. 396; *Marshall* v. *Broadhurst*, 1 Cromp. & J. 405; *Collinson* v. *Lister*, 20 Beav. 356; *Farrow* v. *Wilson*, L. R. 4 Com. P. 744; *Hoss*

S. M. Co. v. *Rosensteel*, 24 Fed. Rep. 583; *Smith* v. *Wilmington etc. Co.*, 83 Ill. 498; *McGill* v. *McGill*, 2 Met. (Ky.) 258; *Blake* v. *Niles*, 13 N. H. 459; 38 Am. Dec. 506; *Kernochan* v. *Murray*, 111 N. Y. 306; 7 Am. St. Rep. 744; *Dickinson* v. *Calahan*, 19 Pa. St. 227; *White* v. *Commonwealth*, 39 Pa. St. 167; *Stumpf's Appeal*, 116 Pa. St. 33.

But where the contract with the deceased is executory, and the personal representative can fairly and fully execute it as well as the deceased himself could have done, he may do so, and enforce the contract. And on the other hand, the personal representative is bound to complete such a contract, and if he fails to do so, he may be compelled to pay damages out of the assets in his hands: 1 Parsons on Contracts, 131; *Saboni* v. *Kirkman*, 1 Mees. & W. 418; *Wentworth* v. *Cock*, 10 Ad. & E. 42; *Janin* v. *Browne*, 59 Cal. 37; *Smith* v. *Wilmington etc. Co.*, 83 Ill. 498; *White* v. *Commonwealth*, 39 Pa. St. 167; *Billings's Appeal*, 106 Pa. St. 558. In the case of *Janin* v. *Browne*, 59 Cal. 45, the majority of the court said: "In construing contracts it is permissible for a court to place itself as near as may be in the position of the parties. The complaint alleges that the deceased was the owner of a large tract of land adjacent to and surrounding the land of plaintiff on which the house was erected, 'and was desirous of improving and building up said neighborhood, for the purpose of attracting purchasers for his said land.' With this inducement he agreed to improve the lands of plaintiff, to superintend the house erected by the expenditure of plaintiff's money, and to guarantee him a certain profit upon the investment. All that required any peculiar skill, taste, or judgment was done by deceased in his lifetime. We are of opinion that the contract and right of action upon it survived."

It must be confessed that the line of demarkation between the two kinds of contracts under consideration is not very clearly marked in some instances. And no doubt the facts and circumstances of each particular case will be taken into account in determining whether the contract was purely personal in its nature, and therefore determined by the death of the party, or one which the personal representative could complete as well as the deceased could have done. Thus in the case of *Dickinson* v. *Calahan*, 19 Pa. St. 227, one of the parties to the contract agreed to sell to the other all the lumber to be sawed at his mill during the next five years, to average three hundred thousand feet a year, but not stipulating for any particular quantity in any one year, the lumber to be paid for as delivered, the heirs or representatives of the parties not being mentioned, it was held that this contract was merely a personal relation, which was dissolved by the death of either party thereto, and that the administrator was not bound to complete it, nor for any breach thereof occurring after the contractor's death; while in the later case of *Billings's Appeal*, 106 Pa. St. 558, it was held that a contract for the cutting of timber, which does not necessarily involve the personal skill or expert knowledge of the contractor, which, by its terms, is extended to the heirs, executors, and administrators of the parties, and which can be completed within a reasonable time, survived the death of both parties, and bound their personal representatives. The fact that such a contract can be completed within a reasonable time is doubtless important in such cases. For an executor, unless expressly authorized by the will, cannot carry on the trade of the testator, except to wind it up: *Collinson* v. *Lister*, 20 Beav. 356.

CONTRACT TO MARRY EXTINGUISHED BY DEATH OF PROMISOR. — A contract to marry is regarded as personal in its nature, and is extinguished by the death of the promisor, and an action for the breach of such a contract cannot be maintained against his personal representative. Nor is the prom-

isee a creditor of the promisor to whom administration can be granted: 1 Parsons on Contracts, 130; 3 Wait's Actions and Defenses, 251; *Chamberlain* v. *Williamson*, 2 Maule & S. 408; *Stebbins* v. *Palmer*, 1 Pick. 71; 11 Am. Dec. 146; *Smith* v. *Sherman*, 4 Cush. 408. *Contra*, *Shuler* v. *Millsaps*, 71 N. C. 297, under a statute of that state. In delivering the opinion of the court in *Stebbins* v. *Palmer*, 1 Pick. 71, 11 Am. Dec. 146, Wilde, J., said: "An action for the breach of a promise of marriage would not survive, for it is a contract merely personal; at least it does not necessarily affect property. The principal ground of damages is disappointed hope; the injury complained of is violated faith, more resembling, in substance, deceit and fraud, than a mere common breach of promise."

But an agreement to support a bastard child survives the death of the promisor, and may be enforced against his personal representative: *Stump's Appeal*, 116 Pa. St. 33.

CONTRACT OF GUARANTY NOT TERMINATED BY DEATH OF GUARANTOR.—There are cases which hold that a continuing guaranty, where each new advance constitutes a fresh consideration, is, in the absence of any express provision to the contrary, revoked, as to subsequent advances, by the death of the guarantor: *Harvie* v. *Fawcett*, L. R. 15 Eq. Cas. 311; *Coulthart* v. *Clementson*, L. R. 5 Q. B. D. 42. But where a guaranty creates a continuing pecuniary obligation, the consideration for which is entire and given once for all, the contract is not terminated by the death of the guarantor, unless the intention that it shall so terminate is clearly expressed in the guaranty itself. And this is particularly the case where the guaranty is one which the guarantor could not have determined in his lifetime: *Lloyd's* v. *Harper*, L. R. 16 Ch. D. 290; *Estate of Rapp* v. *Phœnix Ins. Co.*, 113 Ill. 390; 55 Am. Rep. 427; *Menard* v. *Scudder*, 7 La. Ann. 385; 56 Am. Dec. 610; *Kernochan* v. *Murray*, 111 N. Y. 306; 7 Am. St. Rep. 744. But see, *contra*, *Jordan* v. *Dobbins*, 122 Mass. 168, 23 Am. Rep. 305, where it was held that a guaranty of the payment for goods to be sold to another, not founded upon any present consideration passing to the guarantor, and providing that it should continue until written notice should be given of its termination, is revoked by the death of the guarantor.

CONTRACT OF SURETYSHIP NOT TERMINATED BY DEATH OF SURETY. — The death of a surety on a bond conditioned to perform an act within a certain definite period, or before notice to the obligee of withdrawal therefrom, does not terminate his liability, and his personal representatives will be responsible, especially where the surety binds himself, his heirs, executors, and administrators: *Hecht* v. *Weaver*, 34 Fed. Rep. 111; *Moore* v. *Wallis*, 18 Ala. 458; *Hightower* v. *Moore*, 46 Ala. 387; *Royal Ins. Co.* v. *Davies*, 40 Iowa, 469; 20 Am. Rep. 581; *Green* v. *Young*, 8 Greenl. 14; 22 Am. Dec. 218.

In *Hunt's Appeal*, 105 Pa. St. 128, it was held that a covenant to be responsible for and guarantee payment of the interest on a mortgage until the mortgaged premises should be so improved as to constitute adequate security for the debt survives the death of the covenantor. In *Browne* v. *McDonald*, 129 Mass. 66, it was decided that a contract, the duration of which is not fixed, to pay a reasonable compensation for the board, tuition, and clothing of a person whom the promisor is not bound to support, terminates with the death of the promisor.

CONTRACT OF JOINT OBLIGOR TERMINATED BY HIS DEATH. — It is a well-settled rule of law that if one of two or more joint obligors dies, his personal representatives are, at law, discharged from liability, and the survivor or sur-

vivors alone can be sued on the obligation: *Towers* v. *Moor*, 2 Vern. 98; *Simpson* v. *Vaughan*, 2 Atk. 31; *Pickersgill* v. *Lahens*, 15 Wall. 140; *Bradley* v. *Burwell*, 3 Denio, 61; *Getty* v. *Binsse*, 49 N. Y. 385; 10 Am. Rep. 379; *Wood* v. *Fisk*, 63 N. Y. 245. And the same rule is applied in equity, unless the obligation was, by fraud or mistake, made joint, instead of being made joint and several: 1 Story's Eq. Jur., secs. 162–164; *Simpson* v. *Field*, 2 Cas. Ch. 22; *Sumner* v. *Powell*, 2 Mer. 355; 1 Turn. & R. 423; *Wilmer* v. *Currey*, 2 De Gex & S. 347; *Other* v. *Iveson*, 3 Drew. 177; *Jones* v. *Beach*, 2 De Gex, M. & G. 886; *Richardson* v. *Horton*, 6 Beav. 185; *Harrison* v. *Field*, 2 Wash. (Va.) 136; *Carpenter* v. *Provoost*, 2 Sand. 537; *Getty* v. *Binsse*, 49 N. Y. 385; 10 Am. Rep. 379; *Wood* v. *Fisk*, 63 N. Y. 245; 20 Am. Rep. 528. In *United States* v. *Price*, 9 How. 92, a joint and several bond had been given to the United States for certain duties, but the United States had recovered judgment against all the obligors jointly, and it was held that the plaintiff, having thus elected to hold them as joint debtors, could not proceed in equity against the estate of one of them who had died.

It is not a principle of equity that every joint contract is to be considered as if it were joint and several: *Sumner* v. *Powell*, 2 Mer. 30; 1 Turn. & R. 423; *Jones* v. *Beach*, 2 De Gex, M. & G. 886. When the obligation exists only by virtue of the covenant, its extent is to be measured only by the words of the covenant: *Sumner* v. *Powell*, 2 Mer. 30; 1 Turn. & R. 423. But where it is clearly shown that an obligation intended to be made joint and several has, by fraud or mistake, been made joint only, equity will grant relief against the fraud or mistake, and will hold the representatives of the deceased obligor responsible: 1 Story's Eq. Jur., sec. 162; *Simpson* v. *Vaughan*, 2 Atk. 31. Where two or more persons become sureties for another in a joint obligation, there is an implied agreement among the sureties, arising at the time when they execute the principal contract, that, as between themselves, they will contribute ratably towards discharging any liability which they may incur in consequence of becoming such sureties; and such agreement is binding upon the representatives of any of them who may die: *Bradley* v. *Burwell*, 3 Denio, 61.

PERSONAL REPRESENTATIVES NOT BOUND BY PROPOSALS OF DECEDENT. — A mere offer or proposal made by a person in his lifetime, but not accepted before his death, will not bind his personal representatives: *Grand Lodge I. O. G. T.* v. *Farnham*, 70 Cal. 158; *Pratt* v. *Trustees of Baptist Society of Elgin*, 93 Ill. 475; 34 Am. Rep. 187; *Wallace* v. *Townsend*, 43 Ohio St. 537; 54 Am. Rep. 829; *Phipps* v. *Jones*, 20 Pa. St. 260; 59 Am. Dec. 708; *Helfenstein's Estate*, 77 Pa. St. 328; 18 Am. Rep. 449. An administrator has no right to make an invalid contract of his intestate binding upon his estate: *Smith* v. *Brennan*, 62 Mich. 349; 4 Am. St. Rep. 867.

RUDD *v.* ROBINSON.

[126 NEW YORK, 113.]

DIRECTOR OR STOCKHOLDER OF CORPORATION NOT CHARGEABLE WITH KNOWLEDGE OF ITS TRANSACTIONS. — A director or stockholder of a corporation is not chargeable with actual knowledge of its business transactions merely because he is such director or stockholder.

BOOKS OF ACCOUNT OF CORPORATION NOT OF THEMSELVES COMPETENT EVIDENCE TO ESTABLISH LIABILITY OF DIRECTOR TO CORPORATION. — In an action brought in behalf of a corporation against one of its directors to establish an account or claim against him, the books of account of the corporation are not competent evidence, of themselves, to establish his liability. A corporation seeking to enforce a claim against one of its directors or stockholders must establish it by the application of the same rules of evidence that are applied in an action brought by an individual to enforce a claim against any defendant.

THE opinion states the case.

Thomas Darlington, for the appellant.

Benjamin F. Blair, for the respondent.

EARL, J. The plaintiff is receiver of the Goodwillie-Wyman Company, an insolvent manufacturing corporation organized under the laws of this state. The action was brought in equity to charge the defendant as a trustee of the corporation for the unlawful receipt and appropriation of its money and property. An interlocutory judgment was rendered against him, charging him with a large amount of money thus improperly received and appropriated.

The liability of the defendant for this money was, in the main, established by the account-books of the corporation, and the principal contention on his behalf upon this appeal is, that those books were improperly received as evidence against him.

The capital of the corporation was fifty thousand dollars, of which Robinson, Briggs, and Innet, three of the directors, owned one thousand dollars each; and the balance of the stock was owned by Fisk and Goodwillie, the two other directors. Goodwillie was president, Fisk treasurer, and Briggs vice-president and secretary, of the corporation.

There was no proof that the defendant had actual knowledge of the entries contained in the books which were used as evidence against him, or that he authorized such entries, or caused them to be made. There was no proof from which the law would raise a legal presumption that he had knowledge of the entries, unless he is chargeable with such knowledge from

the mere fact that he was a stockholder and trustee of the corporation.

There is no rule of law which charges a director or stockholder of a corporation with actual knowledge of its business transactions merely because he is such director or stockholder. In this case the broad claim is made that in an action by a corporation against one of its members to enforce a personal liability to the corporation, its books are competent evidence against him to show the condition of the accounts between him and it, and to establish the extent of his liability to it upon their simple production, and proof that they are the books of the corporation, kept as such by its officers and agents. The proposition is thus announced in the points of the learned counsel for the plaintiff: "Between a corporation and its members, all its books, regularly kept by its officers and agents for the purpose of recording its transactions and properly conducting its business, are *per se* evidence."

The cases reported in this country and England bearing upon this question are very numerous, and the general expressions of judges contained in their opinions are not entirely harmonious. The conflict, however, is mainly in the *dicta* of judges, and not in decisions actually made.

The books of corporations for many purposes are evidence, not only as between the corporation and its members, and between members, but also as between the corporation or its members and strangers. They are received in evidence generally to prove corporate acts of a corporation, such as its incorporation, its list of stockholders, its by-laws, the formal proceedings of its board of directors, and its financial condition when its solvency comes in question. But we have not been able, after a careful examination of the authorities cited by the counsel for the plaintiff, and many others, to find any case in which it has been decided that the books of account of a corporation are competent evidence, of themselves, to establish an account or claim against a trustee or stockholder in an action brought in behalf of the corporation; and it has been repeatedly said by judges and text-writers that they are not competent for that purpose.

In Wharton on Evidence, 3d ed., sec. 662, it is said that even in suits by a corporation against its members, its books cannot be used as "proving in behalf of the corporation self-serving entries." In Angell and Ames on Corporations, 11th ed., sec. 679, it is said: "Entries in the books of a corporation of pri-

vate pecuniary transactions with a stockholder are not admissible against him, especially when it does not appear by whom the entries were made." See also 2 Waterman on Corporations, 646. In *Hager* v. *Cleveland*, 36 Md. 476, in an action by a creditor of a manufacturing corporation against a stockholder to enforce his individual liability for a debt contracted by the company, it was held that the books of the corporation relating to its private transactions were not admissible in evidence. In *Hill* v. *Manchester etc. Water Works Co.*, 5 Barn. & Adol. 866, by a clause in the charter of the defendant, it was enacted that its clerks should, in a book provided by the company, keep an account of all acts, proceedings, and transactions of the company, and that every proprietor should have liberty to inspect the same, and take copies of the entries; and it was held that entries of the proceedings in the books thus kept by the clerk were not admissible in evidence on behalf of the company against one of their own members suing them. Denman, C. J., writing the opinion, and speaking of certain facts to be proved, said: "These points of fact, however, could only be established by the books kept by the clerk of the company; and the question now to be decided is, whether they are evidence against the plaintiff. It is argued that they were, because he was a proprietor, and the books of a partnership are evidence against any one of the partners, and more particularly as the act requires such books of the proceedings to be kept, and that all the proprietors shall have free access to them at all reasonable times. We are, however, of opinion that the principle on which partnership books are evidence against the partners is, that they are the acts and declarations of such partners, being kept by themselves, or by their authority by their servants, and under their direction and superintendence. But the clerk of the company, once appointed, is subject to the control of no individual member, and the free access provided for is only for the purpose of inspection. A proprietor entering into a contract with the company must be deemed a stranger, and can be affected by no entry made under orders from the entire body."

In *Haynes* v. *Brown*, 36 N. H. 545, the action was by a creditor of a corporation to recover against a stockholder, and it was held that the books of the corporation were not admissible against a member of the company as evidence of his private transactions or dealings with the company, and that in respect to them he was to be regarded as a stranger. That

case has been frequently cited by text-writers and judges, and its authority for the rule thus announced has never been questioned, so far as we can discover. In *Chenango Bridge Co.* v. *Lewis*, 63 Barb. 111, it was held that the books of a bridge company, proved by its treasurer to have been received by him as the company books upon his accession to the office, containing an account of the tolls received for the bridge for several years previous to that time, were not admissible as against the defendant, a stockholder of the company, to prove the amount of the tolls received during that period, without the necessary and preliminary proof as to such tolls; but that such books proved, by its treasurer, to have been kept him, and to contain correct entries of tolls, as given to him by the toll-gatherer, coupled with the proof by the toll-gatherer that he had made correct returns of the tolls received by him, were admissible, because proved by the treasurer who kept them. See also *Olney* v. *Chadsey*, 7 R. I. 224; *Wheeler* v. *Walker*, 45 N. H. 355. In *Pearsall* v. *Western Union Tel. Co.*, 124 N. Y. 256, 21 Am. St. Rep. 662, the plaintiff was a stockholder of the defendant, and brought the action to recover damages against the defendant for not properly transmitting a message, and it was offered to be proved, in defense of the action, that the board of directors had adopted a resolution that it would not be liable for mistakes or delays in the transmission or delivery of unrepeated messages, and would not be liable for damages arising from delays in the transmission or delivery of a repeated message beyond an amount specified; and it was insisted that a share-holder was chargeable with notice of this resolution. The resolution was excluded, and the defendant excepted, and it was held that in this there was no error; that a share-holder in a corporation is not chargeable with constructive notice of resolutions adopted by the board of directors, or by provisions in the by-laws regulating the mode in which its business shall be transacted with its customers, and that the plaintiff's rights arising out of defendant's contract to transmit the message were in no wise limited by its regulations or by-laws not brought to his knowledge. That case is ample authority to show that the defendant in this case was not chargeable with knowledge of the entries made in the books of this company, and that such books were not competent evidence against him of such entries. The principle at the foundation of that decision is, that the business transactions of a corporation with its mem-

bers are on the same footing as its transactions with strangers, and that the business entries in the books of a corporation are no more evidence against the members than they are against strangers.

After a careful consideration of all the cases which have come to our attention, we can perceive no principle upon which the account-books of a corporation can be evidence against a member of the corporation of the accounts and entries therein made in a suit brought by the corporation or its representatives against him to enforce his liability upon such account. The officers and book-keepers of a corporation are in no sense his agents. Individually, he has no control over their acts, and has no responsibility therefor; and in making the entries they do not, in any legal sense, represent or bind him. As to the competency of such books, directors and stockholders of a corporation stand upon the same footing. It is quite true that a director stands in a more favorable position to know what is going on within the corporation and to be more familiar with its books in some cases than a stockholder. He has the right to inspect the books of the corporation, and so has a stockholder. A stockholder having the ability is just as able to become familiar with the contents of the books of a corporation to which he belongs as a director; and there is no principle of law by which a director can be charged with knowledge of the entries in the books of a corporation, which is not equally applicable to its stockholders. It is frequently easier to charge a director with knowledge of the books than it is to charge a stockholder, because he usually has an active part in the management of the corporation; but as a general rule, many directors in corporations are just as ignorant, and necessarily so, of the particular accounts contained in its books as stockholders are. It would be quite a dangerous, and we think startling, proposition to hold that a clerk or other officer in a business corporation could enter charges in its books of account against a director or stockholder which could be proved in favor of the corporation by the mere production of the books, thus throwing upon him, or his personal representatives after his death, the burden of explaining the entries or showing them to be untrue, and we believe the doctrine has no support in principle or authority. A corporation seeking to enforce a claim against one of its directors or stockholders must establish it by the application of the same rules of evidence which are applied in an action

brought by an individual to enforce a claim against any defendant.

It was admitted on the argument of this case that the evidence furnished by the account-books was vital to the plaintiff's case, and we therefore do not deem it important to examine the other points zealously and ably argued before us.

For the error pointed out, the judgment should be reversed, and a new trial granted, costs to abide event.

DIRECTORS AND SHARE-HOLDERS OF CORPORATIONS, WHEN NOT CHARGEABLE WITH KNOWLEDGE OF ITS ACTS. — A share-holder is not chargeable with constructive notice of the resolutions of its directors: *Pearsall* v. *Western Union Tel. Co.*, 124 N. Y. 256; 21 Am. St. Rep. 662. In order to bind a stockholder, and make valid a contract which would otherwise be void, it must be shown that he had knowledge of such contract: *Wilbur* v. *Stoepel*, 82 Mich. 344; 21 Am. St. Rep. 568. In *First Nat. Bank* v. *Drake*, 29 Kan. 311, 44 Am. Rep. 646, the court said: "We do not think it can be said, as a matter of law, that the directors are conclusively presumed to know the general business of the corporation." Knowledge of some of the directors does not imply knowledge of all: *Leggett* v. *New Jersey etc. Co.*, 1 N. J. Eq. 541; 23 Am. Dec. 728. A stockholder to whom a corporation became immediately indebted in excess of the statutory limit cannot recover against stockholders who did not consent: *Connecticut etc. Bank* v. *Fiske*, 62 N. H. 178.

ENTRY IN BOOKS OF CORPORATION NOT SUFFICIENT TO CHARGE A DIRECTOR. — A director will not be held responsible on entries made in the books of the concern, of which he had no knowledge: *First Nat. Bank* v. *Drake*, 29 Kan. 311; 44 Am. Rep. 646.

SHIPMAN *v.* BANK OF STATE OF NEW YORK.

[126 NEW YORK, 318.]

RELATION BETWEEN BANK AND DEPOSITOR THAT OF DEBTOR AND CREDITOR. — Deposits of money made by a depositor with a bank create between them the relation of debtor and creditor, and the law implies a contract on the part of the bank to disburse the money standing to the depositor's credit only upon his order and in conformity with his directions.

BANK CANNOT CHARGE DEPOSITOR WITH PAYMENTS MADE WITHOUT HIS DIRECTION. — A bank is not entitled to charge against its depositor's account any sums as payments, unless they have been made to such persons as he directed. Payments of the depositor's funds made by the bank without his order afford to it no protection when called upon by him to account for the money deposited.

PAYMENTS UPON FORGED INDORSEMENTS DO NOT EXONERATE BANK WHERE DEPOSITOR NOT CHARGEABLE WITH NEGLIGENCE. — Payments made by a bank upon forged indorsements are at its peril, unless it can claim protection upon some principle of estoppel, or by reason of some negligence chargeable to the depositor.

ACCOUNT STATED BY BANK TO ITS DEPOSITOR MAY BE OPENED UPON PROOF OF FRAUD OR MISTAKE. — An account stated by a bank to its depositor, by its balancing and returning to him his pass-book, with the vouchers, can always be opened upon proof of mistake or fraud, unless the depositor is chargeable with negligence. The only effect of the silence of the depositor as to the correctness of the account rendered by the bank is to put upon him the burden of showing that the account, as stated, was the result of fraud or mistake.

DRAWER OF CHECK IS NOT PRESUMED TO KNOW SIGNATURE OF PAYEE. — The drawer of a bank check is not presumed to know the signature of the payee. The bank must, at its peril, determine that question. When, therefore, a bank returns to its depositor a check, as evidence of a payment made by his direction, he has the right to assume that the bank has ascertained the indorsement upon it to be genuine.

CHECK MADE PAYABLE TO ORDER OF FICTITIOUS PERSON NOT IN EFFECT PAYABLE TO BEARER WHEN. — The rule that a negotiable instrument made payable to the order of a fictitious person and negotiated by the maker has the same validity, as against the maker and all persons having knowledge of the facts, as if payable to bearer, applies only to paper put into circulation by the maker with knowledge that the name of the payee does not represent a real person. Such paper cannot be treated as payable to bearer unless the maker knows the payee to be fictitious, and actually intends to make it payable to a fictitious person.

EQUITABLE DEFENSE UNAVAILABLE WHEN. — In an action against a bank, brought by a depositor to recover money deposited with it, part of which it had paid out on checks upon which a clerk of the plaintiff had forged the indorsements of the payees, it appeared that said clerk had made good to the payees the amounts of such checks, and the defendant set up this fact as a partial equitable defense, but as it did not appear with what funds or in what manner said clerk made such payments, nor that they were made at the expense or to the injury of the defendant, nor that the plaintiff profited by them, and as it did appear that the plaintiff had paid, on account of the frauds of said clerk, more than the amount of these checks, it was held that a refusal to charge that the plaintiff, not having sustained any loss by reason of such checks, was not entitled to recover upon them was not error.

ACTION to recover money deposited with a bank. The opinion states the case.

William Allen Butler, for the appellant.

Elihu Root, for the respondents.

O'BRIEN, J. This appeal brings here for review a judgment of over two hundred and twenty-three thousand dollars recovered by the plaintiffs against the defendant, upon a state of facts fully found and stated by the referee in his report, and in regard to which there is little, if any, serious dispute between the parties. The form of the action is for the recovery of a sum of money which, it is claimed, the defendant undertook, when accepting the plain-

tiffs' deposits, to pay to them or upon their order and direction. It has been found, and is admitted on both sides, that on the 7th of April, 1884, the plaintiffs had upon deposit to their credit with the defendant the sum of $14,499.08; that from this date to the close of business, on the third day of October, 1888, the defendant had and received, to and for the use of the plaintiffs, various other sums of money deposited from time to time between these dates by the plaintiffs with the defendant, amounting in the aggregate to $6,213,586.71; that between the seventh day of April, 1884, and the close of business, on the third day of October, 1888, the defendant paid to the order of the plaintiffs on their checks, drawn against the balance above stated and the deposits subsequently made, various sums of money amounting in the aggregate to $6,030,040.29. This would leave a balance due to the plaintiffs by the defendant of $198,045.50, which, with interest, is the sum that constitutes the subject of this controversy. The defendant alleged in its answer that all moneys deposited with it by the plaintiffs were fully paid upon their order and by checks drawn upon it by them, and in order to meet and disprove the plaintiffs' claim that there was due to them from the defendant at the close of business, on the third day of October, 1888, the sum of $198,045.50, the defendant produced twenty-seven checks, all signed by the plaintiffs and drawn upon the defendant, directing the payment of sums respectively aggregating the total balance above mentioned, and to recover which the plaintiffs brought the action. That the defendant actually paid these checks is not disputed, and the case is thus made to turn upon the question whether they are available to the defendant as lawful vouchers, establishing the fact that the moneys claimed by the plaintiffs were paid out by the defendant upon these checks according to the order and direction of the plaintiffs. A clear understanding of the question involved requires a brief statement of the facts and circumstances under which the twenty-seven checks were signed by the plaintiffs and presented to and paid by the defendant. The plaintiffs are a well-known law firm in the city of New York, engaged in an extensive business which, in its organization, had a department known as the "Real Estate Department." In this branch of their business they examined titles for clients who were lenders of money on bond and mortgage, carried out and completed such loans, and occasionally examined titles for clients who were purchasers of real estate. One of the mem-

bers of the firm had general charge of this department, but the details of the business and the execution of the work were intrusted to subordinates. One James E. Bedell, a lawyer who had been admitted to the bar in the year 1868, and had been in the employ of the plaintiffs since 1873, assisting in the real estate department, was, in the year 1881, practically put in charge of the work of this department, under the direction of the member of plaintiffs' firm who had the general charge. Bedell was an experienced and capable lawyer. The plaintiffs believed that he was honest and trustworthy, and, prior to the discovery of the very extraordinary crimes in connection with these checks, they had no reason whatever to suspect or distrust him. During the period covered by the transactions in question, the plaintiffs employed one Dodge, a competent expert book-keeper, who took charge of the plaintiffs' books and acted as cashier. He kept the account between the plaintiffs and defendant. He filled out all the checks and made all the entries in the check-books, and the checks, when paid by defendant, came to him with the pass-book, which was balanced by the defendant, and the vouchers, including the checks in question, returned with the book, from time to time, at frequent intervals. The course of the business in which the checks in question were issued was, substantially, as follows: The plaintiffs' client, who wished to make a loan through them, furnished the money, which went directly into the plaintiffs' general bank account with the defendant. Against the sum to be loaned and thus put to the plaintiffs' credit, checks were filled up by Dodge, the cashier, from a written statement made by Bedell, showing the amount required to pay liens or charges on the property to be mortgaged, the amount of the plaintiffs' charges and any other items entering into the transaction, and the balance to be paid the borrower. After filling up the checks, Dodge would take the check-book, with the filled-up checks, to a member of the firm for signature, showing him the entries in the check-book of the deposit of the client's money, and the statement of Bedell as to the payments to be made, and thereupon the check would be signed by the plaintiffs, in the name of the individual partner to whom it was presented by Dodge, the firm name being engraved on each check, and the individual signature underwritten. Dodge would then take away the check-book and deliver the several checks to Bedell. In this manner the twenty-seven checks in question were intrusted by the plain-

tiffs to Bedell, their clerk, for delivery to the payees respectively therein named, who were in good faith believed by the plaintiffs to be real persons, entitled to receive the amount of said checks, respectively, from them or their clients. The defendant paid the checks to a third person, upon an indorsement thereon of the payees named, forged by Bedell, who converted the proceeds to his own use. The names of the payees written in sixteen of the twenty-seven checks, drawn for sums aggregating $112,818.72, were not the names of real, but fictitious, persons. The remaining eleven checks, drawn for sums aggregating $85,227.08, were made payable to the order of real persons, whose indorsements were in every case forged by Bedell. Only three of the checks, drawn for less than two thousand four hundred dollars, were paid to Bedell by defendant. All the others were deposited, from time to time, in various other banks in the city of New York, and the money thereon received by Bedell from these banks, and the checks all ultimately paid by defendant through the exchanges in the clearing-house, in the due and regular course of business. As to the sixteen checks payable to the order of fictitious persons, the plaintiffs were led by fraudulent contrivances and representations on the part of Bedell, the details of which appear in the record, to believe, and they did in fact believe, until the discovery of the forgeries, that such payees were real persons; and as to all the checks, the plaintiffs did not intend that any of them should go into circulation, or should be paid by the defendant otherwise than through a delivery to and indorsement by the payee named therein. The checks were paid in every case by the defendant, without any inquiry as to the genuineness of the indorsements, and in reliance upon the responsibility of the parties presenting the same, and not in reliance upon anything done or forborne by the plaintiffs, except that they were signed by them. There is no claim that, at the time the defendant paid the checks, it had any knowledge or suspicion, or reason to suspect, that any of the indorsements were forged, or that any of the names were fictitious, or that there was any fraud or irregularity in respect to any of the checks or any indorsement or writing thereon. The plaintiffs' confidence in Bedell, and his representation of them in all their dealings with clients, concerning loans on real estate, continued without interruption until one of these clients, upon examining a fabricated mortgage sent to him by Bedell, had his attention arrested by the faintness of the im-

pression of the seal of the register on the certificate of record, that he sent the mortgage to the register's office for a better sealing. This led to the discovery of all the frauds, forgeries, fabrications of documents, attestations, and official certificates carried on by him in the plaintiffs' office for more than four years. The plaintiffs did not discover that the indorsements on the checks had been forged, or that the amount thereof had not been paid to them or their order, until nearly four months after May 22, 1888, which was the date of the last check so forged. On the discovery of the facts, and before the commencement of this action, the plaintiffs tendered the checks to the defendant, and demanded that the amount of the same should be paid to them, or credited in their account by the defendant, which tender and demand was refused.

The various deposits of money made from time to time by the plaintiffs with the defendant created the relation of debtor and creditor, and the law implies a contract on the part of the defendant to disburse the money standing to the plaintiffs' credit only upon their order and in conformity with their directions. The defendant is not entitled to charge against the plaintiffs' account any sums as payments, unless they have been made to such persons as the plaintiffs directed. Such payments as were made without the order of the plaintiffs of their funds by the defendant afford to it no protection when called upon by the plaintiffs to account for the money deposited. Payments made upon forged indorsements are at the peril of the bank, unless it can claim protection upon some principle of estoppel, or by reason of some negligence chargeable to the depositor. These rules are so familiar and so well established and illustrated by the adjudged cases that a bare reference to them is all that is needful here: *Crawford* v. *West Side Bank*, 100 N. Y. 53; 53 Am. Rep. 152; *Ætna Nat. Bank* v. *Fourth Nat. Bank*, 46 N. Y. 86; 7 Am. Rep. 314; *Corn Exchange Bank* v. *Nassau Bank*, 91 N. Y. 80; 43 Am. Rep. 655; *Phœnix Bank* v. *Risley*, 111 U. S. 125; *Bank of British North America* v. *Merchants' Nat. Bank*, 91 N. Y. 106; *Marine Bank* v. *Fulton Bank*, 2 Wall. 256; *First Nat. Bank* v. *Whitman*, 94 U. S. 347; *Citizens' Nat. Bank* v. *Importers' and Traders' Bank*, 119 N. Y. 195.

The statement of the account made by the defendant to the plaintiffs from time to time, the balancing of the bank pass-book and the return of the same to the plain-

tiffs with the vouchers, including, as they did, the checks in controversy, with the forged indorsements thereon, constitute no obstacle to the maintenance of this action by the plaintiffs, as they were ignorant of the facts and circumstances under which the checks were issued and put in circulation. An account thus stated can always be opened upon proof of mistake or fraud, and the only effect of the plaintiffs' silence as to the correctness of the account rendered by the defendant is to put upon them, in this action, the burden of showing that the account, as stated, was the result of fraud or mistake, a burden which they have fully assumed and met, as the referee has found.

It is urged that the plaintiffs owed the duty to the defendant of examining the vouchers returned to them with the balanced pass-book from time to time, and that a careful examination of the same would have disclosed the fact that the money was received upon the checks by Bedell, and his forgeries thus detected. The duty of examining the returned vouchers was delegated by the plaintiffs to their cashier and book-keeper, who was a faithful and competent person for many years in plaintiffs' employ. The referee found as a fact, from all the circumstances of the case, that the failure to discover the forgeries sooner than they were was not, in any case, caused by any neglect, on the part of the plaintiffs or their cashier, of any duty that the plaintiffs owed to the defendant. The examination of the checks would, of course, enable the plaintiffs to ascertain whether their own signature was genuine, and whether the amount, date, or name of the payee had been changed, but would not necessarily enable them to detect the forgery of the payee's name. The law imposed no duty upon the plaintiffs to do more than they did to ascertain whether the indorsements on the checks were genuine. The defendant's contract was to pay the checks only upon a genuine indorsement. The drawer is not presumed to know, and in fact seldom does know, the signature of the payee. The bank must, at its own peril, determine that question. It has the opportunity, by requiring identification when the check is presented, or a responsible guaranty from the party presenting it, of ascertaining whether the indorsement is genuine or not. When it returns the check to the depositor, as evidence of a payment made by his direction, the latter has the right to assume that the bank has ascertained the fact to be that the indorsement is genuine: *Weisser* v. *Denison*,

10 N. Y. 68; 61 Am. Dec. 731; *Welsh* v. *German-American Bank*, 73 N. Y. 424; 29 Am. Rep. 175; *Frank* v. *Chemical Nat. Bank*, 84 N. Y. 209; 38 Am. Rep. 501; *First Nat. Bank* v. *Whitman*, 94 U. S. 347; *Leather Mfg. Bank* v. *Morgan*, 117 U. S. 107. The plaintiffs committed the examination of the vouchers when returned from the bank to a faithful and competent cashier, who failed to discover the forged indorsements. There is not the slightest reason to believe that if the checks had been examined by one of the plaintiffs themselves, the result would have been any different. We are unable to see that anything was done or omitted by the plaintiffs, with respect to the examination of the indorsements upon the vouchers, that excuses the defendant from its obligation to pay upon a genuine order only. Nor can we perceive anything done or omitted by the plaintiffs in the general conduct and management of their business, or in the employment of and confidence reposed in Bedell, that estops them from alleging that the twenty-seven checks were paid without their authority.

Whether the plaintiffs were guilty of any negligence in that regard was a question of fact, and the finding is, that they were, in so far as the defendant was concerned, reasonably prudent and careful, and that the payment of the checks was not caused by any negligence on their part, and we do not think it can be said that this finding is without evidence. Moreover, it is found that the defendant paid the twenty-seven checks, in each case, without any inquiry as to the genuineness of the indorsements, and in reliance upon the responsibility of the persons presenting the same for payment, and not in reliance upon anything done or forborne by the plaintiffs, except the fact that the checks had been drawn by them; and further, that all the checks except the three paid directly to Bedell, and amounting to less than two thousand four hundred dollars, were presented to the defendant by and paid to banks perfectly solvent, and liable to respond to the defendant for all moneys paid upon the forged indorsements. These findings, supported, as they are, by the evidence, dispose of much of the argument upon which it is sought to establish the proposition that the plaintiffs are, by reason of their own acts and omissions, estopped from claiming that the checks were paid by the defendant without their authority. The facts upon which an estoppel must always be based are found against the defendant. Bedell, in issuing the false checks and fabricating the false papers to conceal his crime, did not act as the plain-

tiffs' agent, and his acts in this regard are not binding upon them, nor are they in any manner affected by his knowledge of the facts. The questions that arise in this case, and are so ably and elaborately discussed in the briefs of counsel, with respect to the examination of the returned checks and pass-book, the manner in which the plaintiffs' business was conducted, and the degree of care and supervision that was exercised over their subordinates, how far the plaintiffs are bound by the criminal acts and knowledge of their clerk, as well as the general rule of estoppel, when applied to this class of cases, are not new. They have been frequently and fully discussed in the numerous cases in this court, involving the rights and duties of banks and depositors, and it would extend this opinion beyond reasonable limits, and serve no useful purpose, to go over the ground again: *Frank* v. *Chemical Nat. Bank*, 84 N. Y. 209; 38 Am. Rep. 501; *Welsh* v. *German-American Bank*, 73 N. Y. 424; 29 Am. Rep. 175; *Weisser* v. *Denison*, 10 N. Y. 68; 61 Am. Dec. 731; *People* v. *Bank of North America*, 75 N. Y. 547; *Leather Mfg. Bank* v. *Morgan*, 117 U. S. 107; *Mayor etc.* v. *Bank of England*, L. R. 21 Q. B. D. 160.

It is enough to state our general conclusion that, with respect to all these points, the defendant has failed to establish any defense to the action.

It is claimed by the defendant that the sixteen checks made payable to the order of persons having no existence were, in legal effect, payable to bearer. It is provided by statute that paper made payable to the order of a fictitious person, and negotiated by the maker, has the same validity, "as against the maker and all persons having knowledge of the facts, as if payable to bearer": 1 Rev. Stats., p. 768, sec. 5.

We are of the opinion, upon examination of the authorities cited by counsel on both sides, that this rule applies only to paper put into circulation by the maker with knowledge that the name of the payee does not represent a real person. The maker's intention is the controlling consideration which determines the character of such paper. It cannot be treated as payable to bearer, unless the maker knows the payee to be fictitious, and actually intends to make the paper payable to a fictitious person: *Irving National Bank* v. *Alley*, 79 N. Y. 536; *Turnbull* v. *Bowyer*, 40 N. Y. 456; 100 Am. Dec. 523; *Vagliano* v. *Bank of England*, L. R. 22 Q. B. D. 103; L. R. 23 Q. B. D. 243; *Armstrong* v. *National Bank*, 46 Ohio St. 512; 15 Am. St.

Rep. 655; 7 Railway and Corporation Law Journal, 114; *Gibson* v. *Minet*, 1 H. Black. 569.

The findings of the referee that the plaintiffs in good faith believed that the names of the payees represented real persons entitled to receive from them the amount of the check in each case, having been led to believe this by the fraudulent contrivances of Bedell, and that they intended that Bedell should deliver the check to a real payee therein named, and that they did not intend that they should go into circulation or be paid by defendant otherwise than through a delivery to and indorsement by the payee named, and that plaintiffs gave no authority to Bedell to indorse the name of the payee or to put the checks into circulation, and that no one in fact relied on any appearance of authority, derived from the plaintiffs, in Bedell to indorse the payee's name upon the checks or to put them in circulation, disposes of this question. The indorsement of the names of the fictitious payees upon the checks, with intent to deceive and to put the checks in circulation, constituted the crime of forgery, by means of which, and without any fault of the plaintiffs, payment was obtained thereon. The defendant does not occupy any different position with reference to the checks payable to fictitious payees than it does with reference to those payable to real parties whose indorsements were forged.

Bedell of course knew that the payees were fictitious, but he was not acting within the scope of his employment, but in carrying out a scheme of fraud upon the plaintiffs; and under such circumstances, his knowledge cannot be imputed to his principals: *Frank* v. *Chemical Nat. Bank*, 84 N. Y. 209; 38 Am. Rep. 501; *Weisser* v. *Denison*, 10 N. Y. 68; 61 Am. Dec. 731; *Welsh* v. *German-American Bank*, 73 N. Y. 424; 29 Am. Rep. 175; *Cave* v. *Cave*, L. R. 15 Ch. Div. 643, 644.

The case presents another and peculiar question. It seems that ten of the eleven checks which were made payable to the order of real persons were made good by Bedell to the several payees, and the defendant has set up these facts in its answer as a partial equitable defense. The referee made no findings on the subject, but Bedell so testified, and was not contradicted; and the question arises upon a request by the defendant to find, in substance, that the amount of these ten checks having been made good by Bedell to the several payees, the plaintiffs, having sustained no loss by reason of the payment thereof, are not entitled to recover in this action against the defendant

any sum on account of or by reason of the payment by defendant of the same. The request was refused, and the defendant excepted. Keeping in view the theory of this action, and regarding the evidence before the referee, we cannot perceive that there was any error in refusing the request.

Bedell testified, in substance, that at the time of the commencement of the action the plaintiffs were liable to clients to the extent of two hundred and sixty-four thousand dollars on account of his frauds. There were two hundred thousand dollars in fabricated mortgages which had been delivered by Bedell to clients on account of an equal sum of money paid by the clients to plaintiffs for investment, and which Bedell had converted to his own use. The sixty-four thousand dollars was obtained through other frauds upon clients, which the plaintiffs were liable to be called upon to make good. One of the plaintiffs testified that his firm had actually paid to clients on account of Bedell's frauds over two hundred and forty-two thousand dollars. It was not shown by what funds or in what manner Bedell made good to the payees the amount of the checks intended for them. None of the money paid by him was traced to the defendant. The plaintiffs' action was not upon the checks, nor for damages by reason of their payment, but on defendant's implied promise to pay the money deposited to the plaintiffs or upon their order. The plaintiffs' case was made out without the checks at all, except so far as they were necessary as proof to open the account stated. In substance, the referee was asked to hold that by reason of the payment by Bedell of the amount of the checks to the persons named therein, without any reference to the source from which the money came, they were to be charged to the plaintiffs the same as if paid by their authority. The proof given did not justify this conclusion. As it was not shown that such payment was made at the expense or to the injury of the defendant, or that the plaintiffs were benefited by it, beyond their whole loss, the cause of action stated in the complaint was not affected by the fact. It is, no doubt, true that payment or indemnity to the payees of checks diverted as these were, made by the wrong-doer, might, under certain circumstances, constitute a basis for equitable relief in an action of this kind, but the proof did not go far enough to warrant it in this case.

The very recent case of *Vagliano* v. *Bank of England*, L. R. 22 Q. B. D. 103, L. R. 23 Q. B. D. 243, occupied such a prominent place in the discussions of the questions involved in this

appeal by the courts below, and it is now so earnestly pressed upon our attention by the learned counsel for the defendant as a controlling authority in support of his views, that we consider it necessary to refer to it and point out, so far as we can, the rule or principle which it decides. In the magnitude of the sum involved, the boldness and ingenuity with which a clerk perpetrated a stupendous fraud upon his employer, and in many other respects, that case doubtless bears a very strong resemblance to this. The question there was, whether the defendant was entitled to debit the plaintiff, one of its depositors, with forty-three forged bills of exchange, amounting in the aggregate to seventy-one thousand five hundred pounds, which it had paid upon a genuine acceptance by the plaintiff, but procured by fraud, under substantially the following circumstances: Vagliano, the plaintiff, was a merchant and foreign banker in London, with correspondents in various parts of the world, and transacting an enormous business with the defendant, his general banker. He employed in his office a considerable number of clerks, and among them one Glyka, who had charge of the foreign correspondence. One Vucina, a merchant and banker at Odessa, was, and for thirty years had been, one of Vagliano's correspondents, transacting with him a large business, and having practically unlimited credit. For many years he had drawn drafts for large amounts, when necessary, upon the plaintiff, payable sometimes to his own order, but more frequently to the order of a payee named therein. The course of business in the office was well known to Glyka, who procured specimens of Vucina's letters of advice, which always preceded the drafts, and specimens of the drafts themselves. Having done so, he had paper prepared identical in general appearance and texture with that upon which Vucina's genuine letters and bills were written. This enabled him to forge letters of advice and drafts with Vucina's name as drawer, which he executed with extraordinary skill, and in each case he wrote upon the face of the bill, as payees, the name of C. Petridi & Co., a firm who carried on business at Constantinople and had business relations with Vucina, but had no connection whatever with the fabricated drafts. Glyka caused these forged letters of advice and drafts to be laid before Vagliano, his principal, who, being deceived by the skillful manner in which the papers were prepared, and the confidence he reposed in his clerks, wrote a genuine acceptance on the face of each bill as it was put before

him, from time to time, during a period of some four months, payable in every case at the Bank of England. These fabricated bills, having been thus accepted, were placed with the other and genuine bills in a box in the office, to be delivered according to the usual course of business, to the proper party, when called for. Glyka stole the bills from the box, forged the indorsement of the payees thereon, presented them at the counter of the bank, and received the money thereon. By the English bills of exchange act of 1882 (45 & 46 Vict., c. 61, sec. 7, subd. 3), it was enacted, with reference to bills of exchange, that "where the payee is a fictitious or non-existing person, the bill may be treated as payable to bearer." The bank defended upon two grounds: 1. That they were protected by this statute; and 2. That the plaintiff was guilty of such negligence as precluded him from claiming that the payments made upon these bills were without authority. On the trial of the action before Mr. Justice Charles, the plaintiff recovered: L. R. 22 Q. B. D. 103. On appeal, the judgment was affirmed, the master of the rolls alone dissenting, on the ground that the bank was protected by the bills of exchange act: L. R. 23 Q. B. D. 243. Thus far the views of the court on both hearings were in harmony with the contention of the plaintiffs in the case at bar, both as to the construction of the statute and the facts bearing on the question of negligence. The judgment, however, has recently been reversed by the house of lords, and we have been furnished with copies of the opinions given upon the final decision of the appeal, and have given to them the careful consideration which the high authority of the tribunal from which they emanate and the importance of the case seems to demand. The main point upon which the case turned in the review by the house of lords, as we understand the opinions, was the construction to be given to the bills of exchange act. It was held, contrary to the opinions below, that whenever the name inserted as payee is without any intention that payment shall be made only in conformity therewith, the payee then becomes a fictitious person within the meaning of the act, and therefore the forty-three bills were within the statute, though Petridi & Co. were in fact existing and real persons. When this conclusion was reached, the plaintiff's case necessarily failed, as it was but another way of stating that the bank paid the fabricated bills according to their legal tenor and effect, and according to the plaintiff's directions; that is, to bearer.

It is hardly necessary to add that if we could follow that case in giving construction to our statute, the same result would follow in this case. But it is quite obvious that we cannot. The language is different. Our statute is a codification of the common law, while the English statute is, and was intended to be, a departure from it. In so far as the opinions deal with the facts of the case upon the question of negligence, it is difficult to deduce from them any abstract rule or principle. Moreover, there is, as it seems to us, a material difference in some respects between the facts of that case and the one at bar. Vagliano, through the contrivances of his clerk, had put before him a fabricated bill the spurious character of which he failed to detect, and he fixed to it a genuine acceptance, thereby accrediting it to the bank as a genuine instrument. He left the bill thus accepted in a place where the dishonest clerk could easily purloin it. The manner in which the business was conducted was such as to enable the clerk to possess himself of the means whereby the fraud was successfully carried out without check or detection. The view of the case taken in the opinions delivered in the house of lords, aside from the question of the construction of the statute, may very well be attributed to a different shading in the facts, and to the further consideration which can be inferred from the record, that that tribunal is not confined, as we are, to a review of the courts below upon questions of law only. For these reasons, the Vagliano case cannot be regarded as authority adverse to the conclusion at which we have arrived in this. We have examined the other exceptions appearing in the record to which our attention has been directed, and we are of the opinion that none of them can be sustained.

The judgment should be affirmed.

BANKS AND BANKING — RELATION BETWEEN BANKER AND DEPOSITOR. — The relation between a banker and a depositor is that of debtor and creditor. The banker impliedly contracts to pay out the money deposited only on the check or order of the depositor: *Grissom* v. *Commercial Nat. Bank*, 87 Tenn. 350; 10 Am. St. Rep. 669, and note. A bank cannot, without the depositor's consent, apply money due him as a depositor to pay off a note held by the bank, upon which he is liable as a surety: *Lamb* v. *Morris*, 118 Ind. 179. Yet the rule seems to be otherwise where the depositor is liable as principal, not as surety, upon a note held by the bank: *Knapp* v. *Cowell*, 77 Iowa, 528. If a bank is the payee and owner of an accepted bill, the acceptor cannot compel it to apply funds which the drawer has with it on general deposit to the payment of such bill: *Flournoy* v. *First Nat. Bank*, 79 Ga. 810. Compare *German Nat. Bank* v. *Foreman*, 138 Pa. St. 474; 21 Am. St. Rep. 908, and note.

BANKS AND BANKING — FORGED INDORSEMENTS. — As to how far a bank is bound to satisfy itself as to the genuineness of an indorsement on a check, and its liability for paying checks upon which indorsements have been forged, see *Armstrong* v. *National Bank*, 46 Ohio St. 512; 15 Am. St. Rep. 655, and particularly note; note to *People's Bank* v. *Franklin Bank*, 17 Am. St. Rep. 898, 899.

CHECKS PAYABLE TO FICTITIOUS PERSON. — The doctrine that a check or bill made payable to a fictitious person or order is payable to the bearer, and negotiable without indorsement, applies only where it is so drawn with the knowledge of the parties: *Armstrong* v. *National Bank*, 46 Ohio St. 512; 15 Am. St. Rep. 655.

ACCOUNT STATED — OPENING FOR FRAUD OR MISTAKE. — Stated accounts are deemed conclusive between the parties, unless some fraud, mistake, omission, or inaccuracy is shown: *Brown* v. *Van Dyke*, 5 N. J. Eq. 795; 55 Am. Dec. 250, and note; *Devecmon* v. *Shaw*, 69 Md. 199; 9 Am. St. Rep. 422, and note; *Ware* v. *Manning*, 86 Ala. 238; *Weed* v. *Dyer*, 53 Ark. 155.

TOWNSEND *v.* BOGERT.

[126 NEW YORK, 370.]

PARTIES TO SUIT IN EQUITY, WHO ARE PROPER. — The rules of pleading in equity, while the same in form with those in actions at law, are broader and more elastic, by reason of the inherent character of the relief which may be sought and given; and it is a general rule in equity that all persons materially interested, either legally or beneficially, in the subject-matter of a suit are to be made parties to it, so that there may be a complete decree which shall bind them all.

CLAIMANT MAY BE MADE PARTY AND REQUIRED TO DISCLOSE HIS INTEREST WHEN. — Where a plaintiff in a suit in equity knows that a third person claims an interest in the subject-matter of the suit, but does not know the nature, extent, or merits of the claim, he may state the facts, call in the claimant as a party, and require him to disclose his alleged interest.

INTEREST OF PARTY, WHICH IS NOT KNOWN TO PLAINTIFF IN PARTITION, PROPERLY DESCRIBED AS "A CLAIM." — The code requires the rights of the parties to a partition suit to be stated in the complaint, "so far as they are known to the plaintiffs"; but so far as these rights are not known, the interest of a party can only be described as "a claim"; for the plaintiff is not bound to admit the validity of an asserted interest the nature of which he does not know.

COMPLAINT IN PARTITION, WHEN SUFFICIENT. — A complaint in partition which alleges that certain persons made parties defendant "claim some right, title, or interest in said premises, the exact nature of which is unknown to the plaintiff, and which is a cloud upon the title to said premises," states a good cause of action against such parties.

COMPLAINT IS NOT DEMURRABLE BECAUSE IT ASKS SOME RELIEF THAT CANNOT BE GRANTED.

SUIT in partition. The facts appear from the opinion.

John Townsend, for the appellant.

John S. Davenport, for the respondents.

FINCH, J. We are of opinion that the general term erroneously sustained the demurrer interposed to the plaintiff's complaint. That pleading, it is conceded, stated a good cause of action for a partition as against the defendants who held undivided interests in the land as tenants in common, and none of whom object to its sufficiency. It avers that the property is of such character and so situated as to make an actual partition impossible, except with grave injury to the interests of the owners, and therefore seeks a sale and division of the proceeds. With that relief in view, it further alleges that other parties, naming them, and being those who now demur, "claim some right, title, or interest in said premises, the exact nature of which is unknown to the plaintiff, and which is a cloud upon the title to said premises," and asks that they be adjudged to have no interest in the property.

The demurrants interpose two objections; one, that the complaint states no cause of action against them, and the other, that a cause of action to determine a claim against real estate is improperly united with one in partition. The demurrants themselves demonstrate that there is no force in the second objection, for they show satisfactorily that none of the conditions made necessary by the code for the maintenance of such an action have been heeded, and that neither such cause of action nor one to remove a cloud have been stated in the complaint. We agree with them that neither in purpose nor result were any such causes of action pleaded, and that the complaint states alone a cause of action in partition.

The question, therefore, is, whether, upon the allegations of the complaint, the right to a partition of the property can be said to affect the defendants who demur. It seems to me that it can. *Prima facie*, and in the absence of a contrary explanation, all persons who either are or claim to be interested in the premises are affected by a demand for a sale and a division of the proceeds, and the cause of action pleaded affects or concerns them, and so becomes a good cause of action for a partition as against them. That the complaint does not show what their interest is, the plaintiff excuses by his ignorance of the nature of their claim, and that is a fault which the defendants can easily repair. That the claim of an interest in the premises may be false or pretended, or unfounded,

we are not to presume in order to sustain the demurrer. It is true that the interest claimed may prove to be of such a character as to be totally unaffected by the partition sought. If that be so, it should be asserted by answer. The presumption raised by the allegations of the complaint is to the contrary; for they are, that the claim is of an interest or right in the property to be sold, and such that it serves to cloud the title. Presumably, that is a claim of right which the partition will affect, and the parties who have made such claim, and by the demurrer admit that they have, must be assumed to have done so in good faith, and not falsely or fraudulently.

The rules of pleading in equity, while the same in form with those in actions at law, are nevertheless broader and more elastic by reason of the inherent character of the relief which may be sought and given. It has always been held as a general rule in equity that all persons materially interested, either legally or beneficially, in the subject-matter of a suit are to be made parties to it, so that there may be a complete decree which shall bind them all: *Caldwell* v. *Taggart*, 4 Pet. 190. In carrying out that rule, it sometimes happens that a plaintiff knows the fact that a third person claims an interest in the subject-matter of the action, but does not know the nature, extent, or merits of the claim, which cannot, nevertheless, be entirely ignored without peril to the completeness of the remedy sought. In such an emergency, the facts may be stated, the claimant be called in as a party, and required to disclose his alleged interest. While bills of discovery are abolished, yet in such a case as we have described, a discovery of the defendant's claim is incidental to the relief sought, and essential to its completeness. Indeed it has been said that every bill for relief is in reality a bill of discovery, since it asks from the defendant an answer as to all the matters charged in the bill: Story's Eq. Pl., sec. 311. The Revised Statutes acted upon these principles in framing the specific rules applicable to actions of partition: 2 Rev. Stats., pt. 3, c. 5, tit. 3, sec. 5. The petition was required to set forth the rights and titles of all persons interested, "so far as the same are known to the petitioner," and the rule to appear and answer required the defendants interested, whether their interest was known or unknown, "to show title to the proportions which they may claim" in the premises: Sec. 13. While the code has changed the forms of pleading, it has not destroyed their essential characteristics except in some

minor degree. In providing for actions of partition, section 1542 was ostensibly founded upon section 5 of the Revised Statutes, and, like that section, requires the rights of the parties to be stated, "so far as they are known to the plaintiffs." So far as they are not known, such interest can only be described as "a claim," for it will not do to say that the plaintiff must admit the validity of an asserted interest the nature of which he does not know.

This complaint therefore alleged all that it could to show why the demurrants were made parties, and how the cause of action concerned them. The relief of a sale could only be complete and effective by the ability to give a clear title: *Bogardus* v. *Parker*, 7 How. Pr. 305. That result could only be reached by bringing the claimants into court and calling upon them to disclose their interest or disclaim its existence, and so the allegations of the complaint were sufficient *prima facie* to extend the one cause of action to the demurrants and bring them within its influence. They are either so situated as to be affected by the decree or not affected by it. Presumably, from the averments of the complaint, they will be affected by it. If, however, they insist that their interest may be of such a character that it will not be affected by a possible sale of the property, or that it cannot or ought not to be tried in the suit, it is enough to say that the plaintiff cannot negative, in his complaint, a character of their claim of which he asserts his ignorance.

If either of those conditions exist, the remedy is not by a demurrer. If the actual partition or sale will not affect or disturb the rights of the party, he may safely disregard the action entirely, since no personal judgment is sought against anybody; or he may answer, showing that his presence is unessential, and ask to have the complaint dismissed as to him. If his interest is of a nature not subject to a trial in the partition suit, he may plead the facts in his answer, and again seek a dismissal of the complaint as against himself. And so his rights may be perfectly preserved without leaving the plaintiff to blunder in the dark to an imperfect remedy.

It may be that the complaint asks some relief which cannot be granted, but that does not make the complaint demurrable.

The judgment of the general term should be reversed, and that of the special term affirmed, with leave to the defendants to answer upon payment of costs from the interposition of the

demurrer and within twenty days after notice of the entry of this judgment upon filing the *remittitur*.

Judgment accordingly.

EQUITY, PROPER PARTIES TO A SUIT IN.—When, for any reason, a court of equity acquires jurisdiction of a controversy, it will require all persons concerned to be brought before the court, in order that their respective interests be charged or protected: *Brown* v. *Buck*, 75 Mich. 274; 13 Am. St. Rep. 438; *Jones* v. *Davenport*, 45 N. J. Eq. 77; *Pratt* v. *Kindig*, 128 Ill. 293; *Wallace* v. *Wallace*, 63 Mich. 326; *Sheppard* v. *Nixon*, 43 N. J. Eq. 627.

BUFFALO LOAN, TRUST, AND SAFE DEPOSIT COMPANY *v.* KNIGHTS TEMPLAR AND MASONIC MUTUAL AID ASSOCIATION.

[126 NEW YORK, 450.]

INFORMATION AS TO CAUSE OF DEATH OF INSURED CANNOT BE REQUIRED BY INSURER WHEN. — Where a contract of life insurance obligates the insurer to pay the amount of the policy to the heirs or legal representatives of the insured "within sixty days after due notice and satisfactory proof of the death" of the insured, without requiring that the cause of death should be communicated, the insurer has no right to demand information of the cause of the death. All that he can require is, that the fact of death shall be shown with reasonable definiteness and certainty.

PHYSICIAN'S CERTIFICATE OF DEATH ADMISSIBLE AS ADMISSION OF PARTY WHEN. — Where a physician's certificate of death of the insured, in which a cause of death is stated, which would, if true, vitiate the policy, is furnished to the insurer as part of the proofs of death, although no cause of death was required to be stated, such certificate, though not admissible as original evidence of the cause of death, is admissible as an admission of the plaintiff in an action against the insurer to recover on the policy, and its reception in evidence does not violate a statutory provision prohibiting a physician from disclosing any necessary information acquired by him in a professional capacity.

ADMISSIONS OF GUARDIAN DO NOT BIND WARD. — Where a guardian makes admissions inconsiderate, unnecessary, and prejudicial to the rights of his ward, the court will not permit the ward's rights to be prejudiced by such admissions.

CERTIFICATE OF ATTENDING PHYSICIAN CANNOT BE REQUIRED AS PART OF PROOFS OF DEATH OF INSURED WHEN. — Where there is no usage known to the insured, nor any provision in the policy requiring that the certificate of the attending physician of the insured shall be furnished as part of the proofs of death, such certificate cannot be required; and an offer to show that by the rules and regulations of the insurer such certificate was required was properly rejected.

RECORDS OF BOARD OF HEALTH NOT EVIDENCE BETWEEN PRIVATE PARTIES OF FACTS RECORDED. — The records of a board of health of a city, re-

quired by police regulations to be kept for local and specific purposes, are not public records in such sense as makes them evidence in a controversy between private parties of the facts recorded.

ACTION upon a certificate of membership issued by the defendant to John Roberts. The facts appear from the opinion.

David F. Day, for the appellant.

John G. Milburn, for the respondent.

ANDREWS, J. By the terms of the certificate of membership the defendant obligated itself to pay to the heirs or legal representatives of the assured the sum payable on the policy "within sixty days after due notice and satisfactory proof of the death (during the continuation of the contract) of the said John Roberts." There is no requirement that the cause of death shall be communicated to the association by a claimant, nor, under the policy, could this be exacted. The beneficiary of the policy performed his entire legal obligation under the contract when he gave the association due notice of the death of the insured, and furnished proof that the death has in fact occurred. The words "satisfactory proof" entitled the association to demand that the fact of death should be shown with reasonable definiteness and certainty, and if the proofs furnished failed to satisfy the association of the fact of the death, the association, acting reasonably and in good faith, could require further evidence. But the insurer cannot, under guise that the requirement that "satisfactory proof" of the death of the assured should be given, demand information of the cause of the death. This would be a different subject. The information, however important it might be in its bearing upon a death from the excepted causes, nevertheless has no relation to the one fact which alone the claimant is bound to embrace in his proofs: See *Grattan* v. *Metropolitan Life Ins. Co.*, 80 N. Y. 281; 36 Am. Rep. 617; *Charter Oak L. Ins. Co.* v. *Rodel*, 95 U. S. 232.

The guardian of the infant plaintiff, in furnishing to the defendant, as part of the proofs, the certificate of the attending physician of the insured, did a wholly gratuitous act. If it can be treated as an admission by the infant beneficiary that the death was from the cause so certified, it is plain that the act was extremely prejudicial to the interest of his ward, for upon that assumption the infant, the real plaintiff, has, substantially, admitted away his cause of action.

The trial judge, upon the proofs being offered in evidence

by the defendant, refused to permit the certificate of the physician to be read, and this ruling presents the main question in the case. There are two aspects under which the ruling may be considered: 1. Was the certificate inadmissible under section 834 of the Code of Civil Procedure, which declares that "a person duly authorized to practice physic or surgery shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity, and which is necessary to enable him to act in that capacity"? and 2. Assuming that the statute does not apply to the case, and that the certificate would be competent as an admission of the fact certified, if the proofs had been furnished by an adult claimant, can the act of the guardian in this case be treated as an admission by the infant beneficiary of the same fact?

Section 834 is a re-enactment of a similar section in the Revised Statutes: 2 Rev. Stats., p. 406, sec. 73. It is contained in the chapter of the code relating to evidence, and in the article in that chapter entitled "Competency of a witness—Evidence in particular cases." The primary purpose of the section was to declare the rule governing the examination of a physician as a witness in judicial proceedings. The three sections, 834, 835, and 836, relate, respectively, to disclosures by clergymen, physicians, and attorneys, and section 837 declares that "the last three sections apply to every examination of a person as a witness, unless the provisions thereof are expressly waived by a person confessing the patient or the client." The disclosure by a physician of information acquired in his professional character in attending a patient, where not made in the course of his professional duty, is a plain violation of professional propriety. But the statute does not prescribe a rule of professional conduct for the government of physicians in their general intercourse with society. The common law did not protect a physician from disclosing as a witness information acquired professionally from patients: 1 Greenl. Ev., sec. 248. The statute was intended to afford this protection, and to protect the patient also. If a physician, disregarding the plain obligations of his situation, should, in conversation, disclose the secrets of his patient, he would, so far as we know, violate no statute, however reprehensible his conduct would be. The statute should have a broad and liberal construction to carry out its policy. By reasonable construction, it excludes a physician from giving testimony in a

judicial proceeding in any form, whether by affidavit or oral examination, involving a disclosure of confidential information acquired in attending a patient, unless the seal of secrecy is removed by the patient himself. The verified certificate of the physician which accompanied the proofs of loss was not competent original evidence of the cause of the death of the insured, nor was it offered as testimony of the physician as to that fact. The fact that the insured died of delirium tremens was material to the defense. The admission of a party in interest is, as a general rule, competent evidence against him. The presentation of the physician's certificate that the deceased died from the cause stated operated as an admission by the guardian that the fact was as stated. It derived its force from the fact that the claimant communicated to the defendant a statement of the cause of death, which, if true, vitiated the policy. The statement was embodied in a physician's certificate. If it had been contained in the guardian's own statement, or that of any non-professional person, it would equally have been an admission of the fact stated. The certificate was a part of the proofs furnished. Its admission in evidence violated no confidence. The confidence had already been violated by the conjoint action of the physician and the guardian. It was not offered as independent evidence of any fact in the case, but in connection with the circumstances of its transmission to the company, as an admission that the fact alleged was true. It was held in *Mutual Ben. L. Ins. Co.* v. *Newton*, 22 Wall. 32, that preliminary proofs presented to an insurance company under a provision in a policy, as to the proof of death, substantially like that in the present case, were admissible as *prima facie* evidence of the facts stated therein against the insured and in behalf of the company. The case of *Goldschmidt* v. *Mutual Life Ins. Co.*, 102 N. Y. 486, is not in conflict. In that case the question was, whether the record and verdict of a coroner's inquest, finding the fact of suicide, furnished by the claimant with the proofs at the request of the company, but which was accompanied with a protest that the fact found was not true, was an admission by him that the insured died by his own hand, and the court very properly held that it was not. We think the admission in the case was not incompetent because made through the medium of the certificate of the attending physician.

The other ground for excluding the certificate, viz., that the infant was not bound by the admission of the guardian, is,

we think, well taken. The defendant, upon the request of the guardian, furnished blanks for the proofs, including a blank certificate of the attending physician as to the cause of the death, which were filled in by the guardian, and signed and verified by the several persons whose certificates were required, and returned to the company. The office of a guardian is one of trust. He is empowered to act for the ward in the matters confided to him as guardian, in furtherance of his interests. Under the law of agency, the admissions of an agent, made within the scope of his powers, are admissible, in connection with some *res gestæ*, to bind the principal. But the admission must be relevant to the matter in hand, and accompany the transaction to which it relates: *Thallhimer* v. *Brinckerhoff*, 4 Wend. 394; 21 Am. Dec. 155. The power of a guardian to bind his ward by his admissions is more limited than that of an agent acting for an adult principal. The court will not permit the rights of a ward to be prejudiced by the admission of a guardian. His interests are under the protection of the court, and it will intervene to relieve the ward from prejudicial conduct on the part of the guardian. It is a settled rule in chancery that where the infant defends by guardian, his rights are submitted to the court, and he is not bound by admissions in the answer, and the court will not render a decree against the infant solely upon such admissions: *Wrottesley* v. *Bendish*, 3 P. Wms. 235; *Bank of United States* v. *Ritchie*, 8 Pet. 128; *Cooper* v. *Mayhew*, 40 Mich. 528; *Ralston* v. *Lahee*, 8 Iowa, 17; 74 Am. Dec. 291; *Massie* v. *Donaldson*, 8 Ohio, 377; *Turner* v. *Jenkins*, 79 Ill. 229. In the present case, the guardian, in furnishing the physician's certificate, did an act not required by the contract of insurance. Whatever was necessary to be done to enable the guardian to put himself in a position to prosecute the claim, he was authorized to do. There is no ground for impeaching the good faith of the guardian in furnishing the certificate. He probably supposed that the company had the right to exact it. The company, in remitting the blanks, requested him to fill them up, and what he did was in compliance with its request. In procuring the physician's certificate, the guardian misapprehended his duty. It was an act tending to defeat the claim which he had undertaken to collect. The fact asserted in the certificate may have been the truth. But the guardian had no right to foreclose inquiry upon the subject, nor to prejudice the case by changing the burden of proof by

an inconsiderate, unnecessary, and prejudicial admission: See *Serle* v. *St. Eloy*, 2 P. Wms. 386; *Flight* v. *Bolland*, 4 Russ. 298; *Hanna* v. *Spotts's Heirs*, 5 B. Mon. 362; 43 Am. Dec. 132; Wharton on Evidence, sec. 1208; Macpherson on Infants, 83.

The offer of the defendant to show that by the rules and regulations of the defendant the certificate of the attending physician of the insured, in case of death, was required to be furnished as part of the proofs was properly rejected. There is nothing in the contract or in the by-laws of the defendant requiring this, nor was it claimed that if such a rule existed it ever came to the knowledge of the assured. In the absence of any usage known to him, or of any requirement in the policy, that the certificate of the attending physician should be furnished as part of the proofs of death, it could not be required: *Taylor* v. *Ætna Life Ins. Co.*, 13 Gray, 434.

The court also properly excluded the records of the board of health of the city of Buffalo and the certificate of the attending physician filed with the board, stating the cause of death of the insured. The statute (Laws of 1870, c. 519, tit. 12, sec. 10, subd. 5) makes it the duty of the board of health of Buffalo to supervise the registration of deaths and causes of death in the city, and prescribes that no burial of a deceased person shall take place until a certificate shall have been made and presented of the death and its cause, if known, and that a refusal on the part of any person whose duty it is to make out and file for registration any such record shall be a misdemeanor. The ordinances of Buffalo also make it the duty of the attending physician to furnish a certificate setting forth the cause, date, and place of death of any person in the city, and file the same in the office of the board of health. The statute and ordinance were police regulations, and the records were required for local and specific purposes, and are not public records in such sense as makes them evidence between private parties of the facts recorded. We have found no case which would justify their admission in a controversy between private parties as evidence of the cause of death recently happening, where that became a material inquiry.

We find no error in the judgment, and it should be affirmed.

LIFE INSURANCE — TESTIMONY OF PHYSICIANS — DEATH OF PATIENT. — Statements in proof of death, made by the physician of the insured, are privileged communications, and not admissible against the insured; but the party who stands in the place of the deceased may waive the privilege, and request the physician to testify in his behalf: Note to *Westover* v. *Ætna L. Ins. Co.*, 52 Am. Rep. 4, 5.

GUARDIAN AND WARD — ADMISSIONS OF GUARDIAN. — A guardian has no right to admit away the rights of an infant: *Waterman* v. *Lawrence*, 19 Cal. 210; 79 Am. Dec. 212; for the court will not suffer the ward to be prejudiced either by the admissions or laches of his guardian: *Long* v. *Mulford*, 17 Ohio St. 484; 93 Am. Dec. 638, and note.

TIMLIN *v.* STANDARD OIL COMPANY.

[126 NEW YORK, 514.]

LIABILITY OF OWNER OF PREMISES WHO LEASES THEM KNOWING OF NUISANCE THEREON. — Where the owner of premises knows, or can by the exercise of reasonable care ascertain, that they have upon them a nuisance dangerous to the public or to an adjoining owner, it is his duty to abate it before he leases the premises; and if he leases them without doing so, he will be liable to respond in damages to any one injured by and in consequence of the nuisance, even though he did not himself create the nuisance. And this rule applies also to a tenant who sublets the premises, knowing or being chargeable with knowledge of the existence of the nuisance.

MERE ACCEPTANCE OF LEASE DOES NOT RENDER TENANT LIABLE FOR NUISANCE. — A lessee of premises does not become liable for a nuisance existing thereon merely by accepting the lease, but to render him liable it must be shown that he had notice of its existence, or that enough time had elapsed in which he could, by the exercise of proper care, have obtained such knowledge.

ACTION to recover damages for the death of the plaintiff's intestate. The opinion states the facts.

Matthew Hale, for the appellant companies.

Louis Marshall and Nathaniel C. Moak, for the appellants Murphey and Liscomb.

E. Countryman, for the respondent.

PECKHAM, J. The plaintiff brought this action to recover damages arising from the death of her husband, which occurred in the city of Albany, in September, 1885, and for which she claimed the defendants were liable. She recovered a judgment at the circuit, which has been affirmed at the general term, and from the judgment of affirmance all the defendants have appealed to this court. The New York Central and Hudson River Railroad Company owned the premises upon which the wall stood, the falling of which caused the death of the plaintiff's intestate. For a number of years past, a firm named Strain and Reynolds had leased these premises from the railroad company, and in December, 1876, they subleased a portion of them to defendants Murphey and Liscomb for one year

from May 1, 1877, and those defendants occupied such portion up to 1884 as tenants of the firm, by reason of yearly renewals of the lease, either orally or in writing. In 1884, the firm of Strain and Reynolds became the agents of the Standard Oil Company of New York.

In July, 1884, the New York Central Railroad Company, still being the owner of the whole premises, leased them to the Acme Oil Company, one of the defendants, for five years from May 1, 1884. The firm of Strain and Reynolds, in or about May, 1884, as agents of the Standard Oil Company, renewed the lease for one year to defendants Murphey and Liscomb, of that portion of the premises which they had theretofore leased to such defendants, and this lease was, on the 1st of May, 1885, again renewed by Strain and Reynolds as such agents, and in writing, for one year from that date. The individual defendants occupied the portion of the premises leased to them, and the Standard Oil Company occupied the balance, and such relative occupation existed on the twelfth day of September, 1885, when the plaintiff's intestate was killed. The lease from the railroad company to the oil company contained a provision for its termination at any time before the expiration of the five years, at the option of the railroad company, by giving sixty days' written notice to the oil company of its option to so terminate it.

The lease from Strain and Reynolds to Murphey and Liscomb contained a similar clause providing for its termination in the same way. This option was in existence when the lease was renewed, May 1, 1885.

There is no direct evidence of the transfer by the Acme company of its interest, or any portion thereof, in the lease above described, to the Standard company or any other corporation or person.

The property thus leased from the railroad company is situated on the west side of and immediately adjoining lands belonging to the Delaware and Hudson Canal Company upon which the canal company had laid its tracks, which at this point run about north and south. On September 12, 1885, the property was separated from that of the Delaware and Hudson road by a brick wall about eleven feet high and one foot wide, running north and south for a distance of about 111 feet, the wall being laid wholly on the land of the Central-Hudson Railroad Company, but within two inches of the line between the two companies. From the top of this wall there had been

a shed roof running towards the west, which tipped in that direction, so that the water-shed was away from the lands of the Delaware and Hudson company. The wall formed the eastern boundary of the property leased to the Acme company, and the property thus leased, and consisting of not much more than a rough shed, was used as a storage-place for oil, and was but one story high. It was all one building at the time Strain and Reynolds leased it from the railroad company, and they leased the northern end to the individual defendants. There was never any dividing brick wall between the northerly portion occupied by them and the southerly portion occupied by the oil company. There was simply a fence or board partition running east and west and nailed against posts so as to distinguish the parts occupied by each respectively. No barrels of oil were ever put against this brick wall by any of the parties. The brick wall, from the northerly to the southerly end, was one continuous wall, with an angle which was sixty-eight or seventy feet from the northerly end, and in the part occupied by the individual defendants.

The plaintiff's intestate was a laborer in the employ of the Delaware and Hudson Canal Company, and on the 12th of September, 1885, he had gone to work to repair the tracks of that company opposite these premises. While working there the wall fell over and upon him and crushed him to death.

The wall, for about a distance of sixty feet, fell over, the northern end of the fallen portion being about five feet from the northern end of the wall. It is claimed that it was all on that portion of the premises which had been leased to the individual defendants. There was evidence on the part of the plaintiff tending to show that the wall had been in a leaning condition, out of plumb, and dangerous for a number of years, and there was evidence from which a jury might infer knowledge by the oil companies of its condition, and that it was dangerous and liable to fall at the time when the lease was renewed in the name of the Standard Oil Company to Murphey and Liscomb, in May, 1885. There was also evidence from which the jury might have inferred negligence on the part of the oil company if its officers or agents were ignorant of this dangerous condition of the wall at that time.

The plaintiff claims to hold all the defendants on the ground that they were all guilty either of letting premises with a nuisance upon them of a nature dangerous to the public or an

adjoining owner, or of maintaining such nuisance on premises leased to them while such nuisance existed.

The counsel for the Acme company maintains there is no evidence to sustain a recovery against it. That company took the lease of the whole property from the railroad company. There is no evidence of any assignment or sublease to the Standard company, nor any direct evidence upon the subject of the relationship between these two. The Standard company admits, for purposes of its own, that it has been the owner of the lease from the time of its execution, and that its liability is to be determined as if its name had been inserted in the lease. This does not absolve the Acme company. The Standard may admit its own liability, but cannot, by admission, destroy that of the Acme company to the plaintiff, if it otherwise exist. So far as appears, there has been at least entire acquiescence on the part of the Acme company in the assumption of power by Strain and Reynolds, acting as agents of the Standard company, to lease a portion of the premises to the individual defendants and in their reception of rent. The Acme company might have thus acquiesced, because they had transferred by assignment or sublease all their interest to the Standard company at a time when they were entirely ignorant of the existence of any dangerous nuisance on the premises. They also might have acquiesced because, while taking the lease in their own name, they really took it as partners or joint owners with the Standard company, although no formal transfer of the legal title or any portion of it had been made.

An equally strong inference possibly might be drawn as to the existence of either fact, and generally such a condition of the evidence would be fatal to the position of the plaintiff, who asserted the liability of the Acme company. But the nature of the relationship between the two companies was a matter of evidence peculiarly, if not solely, within their power to prove. *Prima facie* the Acme company, being the lessee, assumed the responsibility consequent upon such a position. If their relationship were such as to exempt the Acme company from all liability, is it too much to assume that the fact would have been proved by it? If either one of two inferences could be drawn, the one inculpatory and the other exculpatory of the Acme company, should not a jury be permitted to draw that one most favorable to the plaintiff, when the Acme company, with all the evidence in its own power and possession, fails to produce it, and to thus dispel the doubt? I think the plain-

tiff's evidence left the Acme company under an obligation to show exactly what the relationship was, or else to bear the result of a possible unfavorable inference by the jury: See *Schmidt* v. *Keehn*, 32 N. Y. St. Rep. 11, and cases cited in opinion; Starkie on Evidence, Am. ed., 762.

I think, therefore, we must place both companies in the same condition, and examine their liability as depending upon the same facts.

The individual defendants were not what is termed tenants from year to year, which, for the purpose of terminating the tenancy, may require notice, but they were tenants under a lease for one year, which had been renewed orally or in writing annually, and which had terminated May 1, 1885, and on that date had been renewed in writing until May 1, 1886.

The learned judge left it to the jury to say, upon all the evidence, whether the wall was in a dangerous condition, and a nuisance in law against the adjoining owners and the persons living there, at the time the Standard company obtained the lease or the right to occupy under it; and at the request of the Standard company he further charged that the plaintiff could not recover against that company unless they were satisfied by the evidence that the defendant knew or ought to have known, or had notice, that the wall was in a dangerous condition before May 1, 1885. I think this was a correct statement of the law. Under this charge, the jury could have found that the wall was in a dangerous condition, and was a nuisance, when this sublease was executed to the individual defendants, May 1, 1885, and that the officers or agents of the company knew before that time, or ought to have known, that it was in this dangerous condition. With this knowledge they were bound to enter upon the premises and repair the wall, or take it down, or adopt some steps to avoid the danger before they relet them. If they chose to relet, they took the responsibility: *Gandy* v. *Jubber*, 5 Best & S. 78; *Sandford* v. *Clarke*, L. R. 21 Q. B. D. 398; *Clancy* v. *Byrne*, 56 N. Y. 129; 15 Am. Rep. 391; *Ahern* v. *Steele*, 115 N. Y. 203; 12 Am. St. Rep. 778.

This does not impose the duty of constant care and inspection of premises upon an owner who has let them. It imposes upon him the duty of reasonable care to inform himself of the condition of property which he proposes to let, and if at the leasing he knew, or if in the exercise of reasonable care he would become informed of the fact, that the property has upon it a nuisance dangerous to the public or to an adjoining owner,

it imposes upon the owner and proposed lessor the duty to abate it before he leases such property; and if he do not, it leaves him with a liability to respond in damages to any one injured in consequence of and by the nuisance.

The companies occupied the position of owner of the premises in regard to their liability for a nuisance thereon when they came to sublet them. They were the immediate lessees of the whole property from the owners of the fee, and when they proceed to sublet it or a portion of it, they must stand at such time as owners thereof for all purposes connected with their leasing. The fact that their lessors had the right to terminate their lease upon giving them a written notice of sixty days does not change the liability imposed upon them when they assumed to sublet a portion of the property with a known and dangerous nuisance thereon, — a nuisance of such a character that it was liable at any moment to do damage to an adjoining proprietor or any innocent third person. They cannot be permitted to shield themselves under the plea that they are mere tenants, and that even as tenants they were not themselves occupying the premises, and were not in any sense owners thereof. While their lease lasted, and while they were in possession of the whole premises, they certainly had the right to repair them, so as at any rate to abate a nuisance dangerous to third parties. If, with knowledge of the existence of such nuisance, they choose to sublet all or a portion of the premises, and thus secure compensation for the user thereof, every principle upon which an owner is held liable when he demises property under such circumstances applies to the tenant of the whole property who sublets any portion thereof on which the nuisance, or any part of it, exists.

It was said by Folger, J., in *Swords* v. *Edgar*, 59 N. Y. 28, at page 38, 17 Am. Rep. 295, which was the case of a pier out of repair, that it "was in a ruinous and dangerous condition when it was demised. It was, up to the day of the demise, the duty of the defendants solely to see that it was in a safe condition. There is no suggestion in the case of want of knowledge on their part of its actual condition when leased by them, and the facts of the case are such that they are chargeable with knowledge of its actual dangerous state." And the learned judge in that case held that a lessor was guilty of a nonfeasance or a misfeasance if he have leased the premises in a dangerous condition for the public, instead of first making them safe.

In *Todd* v. *Flight*, 9 Com. B., N. S., 377, decided in the common pleas in 1860, an action was held to lie against an owner who, with knowledge, leased his premises in a dangerous condition (to wit, in such a condition as to be a nuisance), where damage was caused to a third party after such leasing. The opinion was delivered by Erle, C. J., who held the owner guilty of a wrongful act in knowingly renting premises in a condition dangerous to the public or an adjoining owner.

The case of *Edwards* v. *New York and Harlem R. R. Co.*, 98 N. Y. 245, 50 Am. Rep. 659, holds no different doctrine. In that case it was stated in the opinion that the owner is liable if he create a nuisance and demise the premises with the nuisance on it. I think that even if he do not create it, yet if, to his knowledge, it exist on his premises at the time of the demise, and is of a character dangerous to the public or an adjoining owner, or if he were in truth ignorant, and yet by the exercise of reasonable care and diligence he would have known of its existence, there is no principle which can exempt him from responsibility any more than if he created the nuisance himself. The same principle would hold the lessee of the whole premises who, in his turn, and with full knowledge, leases to another the premises, or any portion of them, with the nuisance thereon.

The counsel for the companies says there was no attempt to charge them as owners of the premises. The court did in fact charge that the owner was not a defendant. It is plain, the expression was used with reference to the owner of the fee. Whether they were called, in express terms, owners is immaterial. The court held them not liable unless they knew, or ought to have known, before May 1, 1885, the date of the subletting to Murphey and Liscomb, that the wall was in a dangerous condition amounting to a nuisance to adjoining owners or persons living there. This is the substance of the text of the charge, taken in connection with the request of counsel to charge, which was granted.

It is true that the limitation as to the knowledge of the corporation before the first day of May, 1885, was spoken of only with reference to the Standard company. But the request to charge was limited to that company, and notice to that company might be regarded as notice to the Acme company, in case the jury should find the proper inferences above spoken of with reference to the liability of that company; and hence

if the counsel for the Acme company were not satisfied with the limitation, he should have brought the matter specifically to the attention of the court, and should have asked it to extend the charge, in terms, to the same company.

The cases have all been recently reviewed in the exhaustive opinion rendered in *Ahern* v. *Steele*, 115 N. Y. 203, 12 Am. St. Rep. 778, and it is unnecessary to further elaborate the discussion. I have looked carefully over all the exceptions taken on the part of the counsel for the corporation defendants, and find none upon which to base a reversal of the judgment in this case.

A somewhat different question is presented in the case of the individual defendants. By the charge of the learned judge, they were held liable unconditionally, if the jury came to the conclusion that the wall was in a dangerous condition and a nuisance at the time Murphey and Liscomb leased the premises, in 1885, although they then may have known of the dangerous condition of the wall, and may possibly have remained ignorant, without being guilty of negligence up to the time when the accident occurred.

I think the later cases, and especially the case of *Ahern* v. *Steele*, 115 N. Y. 203, 12 Am. St. Rep. 778, reported since the trial of this action, have cleared up any doubt which may have heretofore existed regarding the ground of the liability of a grantee or lessee of real estate with a nuisance upon it arising from the premises being out of repair. Assuming the liability of the lessee under some circumstances, it does not arise upon the mere execution of the lease. There must be notice of the existence of the nuisance, or time enough must have elapsed in which knowledge of its existence would be obtained by the exercise of reasonable diligence. For the error in the charge of the learned judge regarding the individual defendants, there must be a new trial.

It might also be somewhat of a question whether they would be liable upon the facts herein, viewed in any light. They were never the lessees of the whole premises, in regard to which the wall formed a continuous and solid boundary. Would it be maintained that tenants of rooms in a tenement-house, or of flats in a building rented for that purpose, would be responsible to the public or to adjoining owners, if they neglected to repair one of the main walls of the house which was out of plumb and dangerous to their knowledge? Does the rule as to maintaining a nuisance upon real estate, dan-

gerous to the public, apply in case of one who has but a possession of a portion of the premises, and where the nuisance consists in the dangerous condition of a wall such as existed in this case?

It is true, there is a difference in the situation of the tenants in the tenement-house and persons situated as were these individual defendants, assuming they had knowledge of the dangerous character of the wall. Exactly what their duty and liability were is not entirely clear. A tenant at will of a house which was in a public highway, and in a dangerous condition and liable to fall at any time, has been held liable to indictment as maintaining a public nuisance: *Regina* v. *Watts*, 1 Salk. 357. He was a tenant of the whole house, however, and not of only two or three rooms in it. The court held that the owner of the real estate was not looked to in such case, — it was the occupant; and it was to guard the public safety that he was held, no matter how precarious his title was in point of time.

The questions as to the duty and liability of the individual defendants are important, but it is not necessary to now decide them. Another trial might so result that they would not arise.

For the error in the charge above alluded to, the judgment as to the individual defendants must be reversed, and a new trial granted, with costs to abide the event; but as to the corporation defendants, it must be affirmed, with costs.

LANDLORD AND TENANT — LIABILITY OF LANDLORD FOR NUISANCE. — A landlord cannot escape liability for an existing nuisance by leasing the property on which it exists to a tenant, and putting him in possession: *Wunder* v. *McLean*, 134 Pa. St. 334; 19 Am. St. Rep. 702, and note; *Kern* v. *Myll*, 80 Mich. 525. A landlord is not liable to a stranger for consequences resulting from a nuisance upon leased premises, unless the nuisance existed at the time the premises were demised, or the structure was in such a condition that it would be likely to become a nuisance, and the landlord failed to repair it, or permitted the act which caused it to become a nuisance: *Riley* v. *Simpson*, 83 Cal. 217.

CREGAN *v.* MARSTON.

[126 NEW YORK, 568.]

MASTER NOT BOUND TO REPAIR DEFECTS IN APPLIANCES FURNISHED TO SERVANT WHEN. — It is not the duty of a master to repair defects in appliances used by his servants, arising in the daily use of such appliances, for which proper and suitable materials are supplied, and which may easily be remedied by the servants themselves, and are not of a permanent character or requiring the help of skilled mechanics. It is a duty of the servants to repair such defects when they arise, with the materials furnished, especially where the necessity springs from their daily use of the appliance, occurs at different and unknown periods in their service, and is open to their observation in the absence of the master.

ACTION to recover damages for the death of the plaintiff's intestate. The opinion states the facts.

E. Louis Lowe, for the appellants.

Charles J. Patterson, for the respondent.

FINCH, J. The plaintiff's intestate was killed while loading coal into buckets which were raised from the hold of a vessel by the aid of a derrick. The rope used for that purpose, and which lifted the loads to the control of the gaff, suddenly parted, and the falling mass crushed the deceased, who died almost immediately from his injuries. There is no question of contributory negligence in the case, and not the least doubt that the defendants did their full duty so far as it consisted in the selection and supply of the rope used.

The controversy is thus narrowed by the facts to the single inquiry whose duty it was to observe and examine the condition of the rope, and change it when so worn that it became unsafe. The lengths of rope used in the derrick were called "falls." The ordinary limit of safety in their use was proved to have been from fourteen to twenty days, — rarely less than that, and sometimes considerably more. Everybody connected with the business knew the consequences of excessive use and the necessity of frequent changes of the falls, but at varying and uncertain periods of time. The fall which was sound and safe in the beginning of a morning's work might become frayed and dangerous before night, and if it did, would become so before the eyes of all the workmen dependent upon it for its use. And that is true, because the proof given by the plaintiff shows clearly that the rope which is sound originally becomes pulpy internally only when use has affected it externally.

Now, it is conceded that the defendants kept on hand and ready for use at any moment an adequate supply of these falls, and of the best and most approved character. After purchasing a coil of rope measuring about one thousand feet in length, it was at once cut up into falls, the ends were tied to keep them from unraveling, each fall was marked with a tag stating its length, and they were then hung up in a dry storeroom under lock and key, and so kept ready for immediate use, and meantime protected from the weather or from injury. If one was wanted, word was sent to the office and the new fall at once supplied for use at the dock. Usually, the engineer or his assistant made the application, but anybody engaged in the work could give the notice and get the new fall. It does not appear that any such application coming from any of the workmen was ever unheeded or refused. The workmen, therefore, were left in a position of perfect safety as to the sufficiency of the falls against everything save their own negligence or error of judgment. The rope was swinging before their eyes, and would disclose its approaching weakness on the surface before it became rotten or pulpy within, and they were able to know how long it had been used, and so whether prudence required it to be changed. They were at liberty, and knew they were at liberty, to supplant one which exhibited marks of weakness with another both new and sufficient, from the supply kept on hand. They were in the daily habit of observing its condition, and it was specially the custom of the engineer to do so. He had examined it a day or two before the accident, and deemed it safe.

On this state of facts, the court charged that it was the duty of the master to the servants to watch the use of the rope by them and its changes of condition; that the engineer was his agent and deputy for such purpose, and that the negligence of the engineer, if it existed, was that of the master. The doctrine at once renders unexplainable all the line of cases in which some defect in a machine has occurred from its use, and the master has been held freed from responsibility if the machine furnished was originally safe and he neither knew nor ought to have known of the existence of the defect; for it puts the duty of daily watch and discovery on him, and so requires no notice or complaint or lapse of time to put him in default.

I think the doctrine asserted was an extension of the master's duty beyond its natural and proper limits. Probably the

existing rule was founded upon the truth that certain things essential to the safety of the servants must necessarily, in the management of the business, emanate from the master and remain in his absolute control, and so the servants should not be responsible to one another for defects which they could not repair for lack both of authority and means. The servants cannot furnish the machines. That is the master's right and duty. But the servant who uses them can and should keep them in order for their proper and safe daily use, when furnished with the necessary means of so doing, and when perfectly capable of correcting the defect.

It is undoubtedly true, as we have often said, that it is the duty of the master to keep a machine or appliance in order, and that he cannot delegate the duty so as to escape responsibility. But that is a general rule, and has its qualifications and limitations. One of those is, that it is not the master's duty to repair defects arising in the daily use of the appliance for which proper and suitable materials are supplied, and which may easily be remedied by the workmen, and are not of a permanent character or requiring the help of skilled mechanics. An apt illustration will be found in the case of *McGee* v. *Boston Cordage Co.*, 139 Mass. 445. The machine was used for the passage of hemp over hackle-pins. These sometimes became bent, so that the fiber clogged, and then the machine was stopped, and the workman drove out the bent pin, and inserted a new one from a supply furnished by the master for that purpose. The change was held to be, not the duty of the master, but that of the servants, and an ordinary detail of their daily duty. It would have been almost absurd to have held otherwise. So in *Webber* v. *Piper*, 109 N. Y. 496, the master had supplied the means of sharpening saws which had become dull, and duplicate saws to take their place when removed, and had assigned the duty of removal to one of his servants, whose neglect, which resulted in an injury, was held to be that of a fellow-servant. The same doctrine was declared in *Johnson* v. *Boston Tow-boat Co.*, 135 Mass. 209, 46 Am. Rep. 458, a case almost exactly like the one before us, and in which the injury resulted from the use, by the servants, of an unsound rope instead of substituting a new one which the master had supplied. In that case, it was said that the master "having provided sufficient appliances, a part of which required occasional renewal from the wear and tear of the use for which it was intended, and provided sufficient means for

such renewal, and employed Moore to have the superintendence of the workmen and the apparatus and appliances, the use of the means provided for keeping the tackle in suitable condition was as truly a part of Moore's duty, as servant, as was the use of the apparatus for the direct purpose of the business, and in performing that duty he was a fellow-servant with the plaintiff." The doctrine thus declared was not at all repudiated, or even modified, by the later case of *Daley* v. *Boston etc. R. R. Co.*, 147 Mass. 101, upon which the general term rely. In that case, the operatives who managed the machine had no duty or responsibility as to a change of the ropes, but were dependent upon the judgment and consent of two other employees, who were not claimed to be fellow-servants of the workmen. And that case draws clearly the distinctions between an original defect in the rope provided and one occurring from its use, and between the duty of ordinary repairs devolving upon the servants and those of a permanent or special character which attach to the master. What was said as to the custody of the ropes had some force in that case, but has no application to the one before us. Here there does not appear to have been at the dock any suitable place for keeping the spare falls, and it was neither negligence nor imprudence to put them under cover or protect them by a lock, so long as they were at all times subject to the needs or requirements of the workmen.

The cases cited, and their doctrine, appear to be founded upon what is determined to be the implied contract relation between the master and servant. Their mutual duties grow out of that relation, and change and vary as it is changed or varied by the facts which indicate and measure it. Where those facts show that in the understanding of both parties a class of ordinary repairs are to be made by the servants with materials furnished by the master for that express purpose; that they and he regard it as a detail of their own work; that it is something entirely within their capacity, and not dependent upon the skill of a special expert; and that the necessity springs from their daily use of the appliance, occurs at different and unknown periods in their service, and is open to their observation in the absence of the master,— the inference is inevitable that the contract relation between the parties makes it a duty of the servants and a detail of their work to correct the defect when it arises, with the materials furnished.

The cases cited by the respondent do not touch the question.

In one, the defect was in an engine which only an expert could repair, and for which the servant was furnished with no materials: *Fuller* v. *Jewett*, 80 N. Y. 50. In one, the chain of an elevator had grown thin, and no new one was supplied: *Corcoran* v. *Holbrook*, 59 N. Y. 518; 17 Am. Rep. 369. In two, the cars or the platform were defective when supplied by the master: *Gottlieb* v. *New York etc. R. R. Co.*, 100 N. Y. 462; *Benzing* v. *Steinway*, 101 N. Y. 547. And in one, the master permitted the use of a rope which was rotten from a year's exposure to the weather, and without supplying a new one: *Baker* v. *Allegheny Valley R. R. Co.*, 95 Pa. St. 211; 40 Am. Rep. 634. In *Cone* v. *Delaware etc. R. R. Co.*, 81 N. Y. 208, 37 Am. Rep. 491, the defect was in the engine, which the servants using it could not be required or expected to repair, and in *Murray* v. *Usher*, 117 N. Y. 543, the platform fell, from an original defect in construction.

In the present case, the master exercised all the reasonable care required. The rope had not been in use so long as to charge the master with knowledge that it had become unsafe, and he had a right to assume that the servants would take no needless risks. So far even as the engineer is concerned, there seems to have been on his part an error of judgment, but not necessarily any negligence in the performance of his duty.

The judgment should be reversed, and a new trial granted, with costs to abide the event.

MASTER AND SERVANT — MACHINERY. — The general rule is, that a master, though not an insurer of the safety of his servants, must do all that human care and foresight can do to furnish and keep in repair safe machinery and appliances for the use of his servants: *South West Imp. Co.* v. *Smith*, 85 Va. 306; 17 Am. St. Rep. 59, and note; *Titus* v. *Bradford etc. R. R. Co.*, 136 Pa. St. 618; 20 Am. St. Rep. 944, and note. But the master is not liable for injuries to his servants occasioned through the improper use of machinery and appliances furnished by him: Note to *Chicago etc. R. R. Co.* v. *Swett*, 92 Am. Dec. 221; *Madden* v. *Occidental etc. Co.*, 86 Cal. 445. A servant cannot recover for injuries sustained from the use of an appliance of his own contrivance, which was constructed at his own suggestion, in the absence of proof of a defect in its construction, or of negligence on the part of the master in the care of it: *Hart* v. *Frick Coke Co.*, 131 Pa. St. 125.

In *Bolton* v. *Georgia etc. R'y Co.*, 83 Ga. 660, where a good ladder was provided by the master, but the servant used a defective one, and was injured, the court decided that the master was not liable to the servant for such injury.

RHODES v. NEWHALL.

[126 NEW YORK, 574.]

BILLS OF LADING CONCLUSIVE AS TO QUANTITY OF GOODS RECEIVED WHEN. — Where a carrier executes and delivers to a consignor bills of lading, acknowledging the receipt on board his vessel of a certain number of bushels of wheat to be transported to a certain place and there delivered to a consignee, subject to a certain charge for freight, and such bills of lading contain the provision, "All the deficiency in cargo to be paid by the carrier and deducted from the freight, and any excess in the cargo to be paid for to the carrier by the consignee," the carrier must account for the precise quantity of wheat acknowledged in the bills of lading, and no other evidence on that point can be received. If, in such case, there be any deficiency in the quantity of wheat receipted for, the value of the deficiency must be deducted from the stipulated freight, and the difference is all that the consignee, who is but the agent of the consignor, can be held liable to pay.

ACTION to recover freight. The opinion states the case.

Benjamin H. Williams, for the appellants.

George J. Sicard, for the respondent.

RUGER, C. J. This action was brought by a carrier to recover from the consignee the freight on a cargo of wheat transported from Duluth to Buffalo and deliverable to the defendant there on payment of the freight and charges.

It is not disputed but that the plaintiffs executed and delivered to the consignor bills of lading acknowledging the receipt on board their vessel of fifty-four thousand bushels of wheat at Duluth to be transported to Buffalo and there delivered to the defendant, subject to a charge of three and three fourths of a cent per bushel for freight, and containing the further provision that "all the deficiency in cargo to be paid by the carrier and deducted from the freight, and any excess in the cargo to be paid for to the carrier by the consignee."

It is conceded by the answer that the carrier delivered at Buffalo to the consignee but 53,178 bushels of wheat, being 827 bushels less than the quantity specified in the bill of lading, and $712.41 less in value; and the question in controversy is, whether the consignee was entitled to deduct this sum from the gross amount of freight earned by the vessel.

The plaintiffs gave evidence tending to show that they delivered all of the wheat at Buffalo which they received on board at Duluth. The trial court deducted the value of the deficiency from the stipulated freight on the fifty-four thousand

bushels, and rendered judgment for the balance, and the general term has affirmed its judgment.

We think that the cause was correctly disposed of in the courts below. The plaintiffs seek to avoid the effect of the stipulation in the contract fixing the quantity of wheat received by them at Duluth, by reference to the cases holding that an acknowledgment in a bill of lading specifying the quantity of merchandise received by them operates as a receipt only, and is subject to correction by proof that such merchandise was not in fact received; citing *Ellis* v. *Willard*, 9 N. Y. 529; *Abbe* v. *Eaton*, 51 N. Y. 410; *Meyer* v. *Peck*, 28 N. Y. 590; and other similar cases. The rule acted upon in those cases, as stated in the head-note of *Meyer* v. *Peck*, 28 N. Y. 590, is, that "an ordinary bill of lading is not conclusive, as between the original parties, either as to the shipment of goods, or the quantity; as to those matters it operates merely as a receipt, and is open to explanation on the trial, by parol evidence." We feel no disposition to question the authority of these cases, or to disregard the principle there laid down, but think that this case is distinguishable in its facts from those considered in the cases referred to.

Here the parties have provided by express language for the particular contingency arising under this contract, and we can evade its operation only by disregarding one of the most imperative rules in the interpretation of contracts. A primary rule of construction requires a contract to be so construed as to give some meaning and effect to all of its language, and if the words used can have an operation which leads to no absurd results, and is not contrary to some provision of law, that meaning must be adopted, rather than one which would render the language meaningless and inoperative.

The provisions fixing the quantity of grain received, and providing a mode by which any deficiency or excess in quantity shall be dealt with, do not seem susceptible of any other effect than to prescribe a rule by which the consignee can determine the amount of freight and charges payable by him to the carrier. For this purpose the provision has a legitimate and natural office to perform, which also accords with the plain signification of the language used.

It seems reasonable that parties should agree upon the quantity of grain shipped when it is designed for transportation to distant markets, with a view of avoiding controversies between

carrier and consignee upon the subject. The cargo was here weighed into the vessel under the supervision and control of the carriers, and they had every opportunity to learn the quantity of grain actually received by them. They thereupon entered into a contract with the consignor whereby it was agreed that any deficiency in the cargo should be paid for by them, and deducted from the freight, and any excess in quantity should be paid to them by the consignee. The deficiency and excess referred to could have related only to a variation from the quantity specified in the bills of lading, as there was no other standard furnished by which a variation could be estimated. This was a contract which the parties were competent to make, and a consideration for the promise to pay for any deficiency was secured by the right to collect the value of any excess. These were mutual obligations, and were obviously incurred for the purpose of avoiding disputes over the quantity actually received by the carrier, and to estop him from disputing the correctness of his acknowledgment. The parties plainly contemplated the contingency of a variance in the course of transportation, between the quantity of grain admitted to have been received by them and that subsequently delivered, and provided in express terms the mode by which their respective rights should be adjusted in that event. The language of the contract is plain and unambiguous, and the right of the parties to make it is indisputable.

Judge Denio said, in *Meyer* v. *Peck*, 28 N. Y. 590: "No doubt it might be made a matter of express contract that the carrier should account for the precise quantity acknowledged in the instrument, and that no other evidence on that point should be received." See *Lishman* v. *Christie*, L. R. 19 Q. B. D. 333.

This, we think, they have done by the contract in question. The consignee in this case is but the agent of the consignor, and is authorized to pay only such freight as is provided for by the bill of lading. He can hold the property only for such advances as the bill of lading directs him to make, and there is no principle upon which he can be made liable for any greater amount than that called for by the letter of his authority to pay.

We have not considered the cases treating of the doctrine of estoppel, as it is unnecessary, in the view we take of the case, to invoke that principle.

The judgment should be affirmed.

BILLS OF LADING, CONCLUSIVENESS OF: See *National Bank of Commerce* v. *Chicago etc. R. R. Co.*, 44 Minn. 224; 20 Am. St. Rep. 566, and note. A bill of lading is both a receipt and a contract. As a receipt, it may be explained or contradicted by oral evidence; but as a contract, it merges all prior and contemporaneous agreements, and in the absence of fraud or mistake, it cannot be explained or contradicted by parol testimony: *Louisville etc. R. R. Co.* v. *Wilson*, 119 Ind. 292.

CASES

IN THE

SUPREME COURT

OF

NORTH CAROLINA.

TUFTS *v.* GRIFFIN.

[107 NORTH CAROLINA, 47.]

CONDITIONAL SALE — CONSIDERATION — LOSS OF PROPERTY BEFORE PAYMENT. — An absolute promise to pay a certain sum, being the balance due upon a conditional sale of personal property under which the vendee took possession and used it in all respects as his own, the vendor retaining the title until the purchase price was paid, is based upon a sufficient consideration, and may be enforced in the event that the property is destroyed by fire without negligence on the part of the vendee before the payment of the purchase price or any default in the payment thereof.

ACTION on the following note and contract of sale: —

"$162.50. LEWISTON, N. C., June 13, 1888.

"For value received, November 1, 1889, after date, I promise to pay to the order of James W. Tufts one hundred and sixty-two dollars and fifty cents, with interest at six per cent. The consideration in this and other notes is the following described soda-water fountain [here follows description], which I have received of said James W. Tufts. Nevertheless, it is understood and agreed by and between me and the said James W. Tufts that the title to the above-mentioned property does not pass to me, and that until all said notes are paid, the title to aforesaid property shall remain in the said James W. Tufts, who shall have the right, in case of non-payment at maturity of either of said notes, and without process of law, may enter and retake immediate possession of said property wherever it may be, and remove the same. J. S. GRIFFIN.

"Witness: D. C. WINSTON."

Judgment for plaintiff for the amount mentioned in the above agreement, with interest, and defendant appeals.

W. L. Williams, for the appellant.

D. C. Winston, for the respondent.

SHEPHERD, J. This is a case of the first impression in this state. We have here an absolute promise of the defendant to pay the plaintiff a certain sum, it being the balance of the purchase-money due the plaintiff upon the sale of a soda apparatus to the defendant. The sale was a conditional one: See *Clayton* v. *Hester*, 80 N. C. 275; *Frick* v. *Hilliard*, 95 N. C. 117, and the cases cited; and under the contract, the defendant took the apparatus into his possession and used it in all respects as his own. Without any negligence on the part of the defendant, and before any default in the payment of the purchase-money, the property was destroyed by fire.

The question is, Who shall bear the loss? The defendant insists that it should fall upon the plaintiff, because the transaction amounted to nothing more than an executory agreement to sell, and that, inasmuch as the plaintiff cannot now perform the contract, the defendant should not be compelled to pay. It is very true that such contracts are sometimes called executory (as in the case of *Ellison* v. *Jones*, 4 Ired. 48), and the vendee is also termed a bailee: *Perry* v. *Young*, 105 N. C. 466; but it must be observed that these expressions are used in reference to the strict legal title to the property, and they can therefore have no influence in the determination of the present question, which is purely one of consideration for an absolute promise to pay.

The recent decision in *Burnley* v. *Tufts*, 66 Miss. 49, 14 Am. St. Rep. 540, is directly in point. There it seems that this same plaintiff sold a soda apparatus under a contract precisely similar to this, and the property was destroyed, as in this case, after some of the notes had been paid, and before the maturity of the others. The court decided that the plaintiff was entitled to recover the amount due upon the remaining notes. As we entirely concur in the reasoning upon which the decision is based, we will reproduce a part of the language of the opinion. The court says: "Burnley unconditionally and absolutely promised to pay a certain sum for the property the possession of which he received from Tufts. The fact that the property has been destroyed while in his custody, and before the time for the payment of the note last due, on payment of which only his right to the legal title of the property would have accrued, does not relieve him of payment

of the price agreed on. He got exactly what he contracted for; viz., the possession of the property, and the right to acquire an absolute title by payment of the agreed price. The transaction was something more than an executory conditional sale. The seller had done all that he was to do, except to receive the purchase price; the purchaser had received all that he was to receive as the consideration of his promises to pay. The inquiry is not whether, if he had foreseen the contingency which has occurred, he would have provided against it, nor whether he might have made a more prudent contract, but it is whether, by the contract he has made, his promise is absolute or conditional. The contract made was a lawful one, and, as we have said, imposed upon the buyer an absolute obligation to pay. To relieve him from this obligation, the court must make a new agreement for the parties, instead of enforcing the one made, which it cannot do."

As is said in the foregoing extract, the vendor has done all that he was required to do, and the transaction amounted to "a conditional sale, to be defeated upon the non-performance of the conditions. The vendee had an interest in the property which he could convey, and which was attachable by his creditors, and which could be ripened into an absolute title by the performance of the conditions": 1 Wharton on Contracts, 617.

The vendee had the actual legal and rightful possession, with a right of property upon the payment of the money: *Vincent* v. *Cornell*, 13 Pick. 296; 23 Am. Dec. 683.

The vendor could not have interfered with this possession "until a failure to perform the conditions": *Newhall* v. *Kingsbury*, 131 Mass. 445.

Having acquired these rights under the contract, and the property having been subjected to the risks incident to the exercise of the exclusive right of possession, it would seem against natural justice to say that there was no consideration for the promise, and that the loss should fall upon the plaintiff.

The case of *Swallow* v. *Emery*, 111 Mass. 356 (cited by the defendant), may perhaps be distinguished from ours, because it was agreed that upon the payment of the price the vendor was to execute a bill of sale to the vendee. However this may be, we think that the principles enunciated in *Burnley* v. *Tufts*, 66 Miss. 49, 14 Am. St. Rep. 540, are better sustained, both by reason and authority, and we therefore affirm the judgment of the court below.

SALES — WHO MUST BEAR LOSS WHERE PROPERTY SOLD IS NOT PAID FOR. — The rule seems to be well settled that where the terms of a simple sale of any specific piece of personal property are agreed upon, and the bargain is struck, while everything the seller has to do about it is completed, and he has authorized the buyer to take it, the contract of sale becomes absolute, without actual payment or delivery, and the property is in the vendee, who has the risk of loss by accident or otherwise without the fault of the seller: *Leonard* v. *Davis*, 1 Black, 476; *Wing* v. *Clark*, 24 Me. 366; *Phillips* v. *Moor*, 71 Me. 78; *Barrow* v. *Window*, 71 Ill. 214; *Willis* v. *Willis*, 6 Dana, 48; *Sweeney* v. *Owsley*, 14 B. Mon. 413. The rule is thus stated in *Hayden* v. *Demets*, 53 N. Y. 426–431: "Upon a valid sale of specific chattels, when nothing remains to be done by the vendor except delivery, whether conditioned upon payment or not, the right of property passes to the vendee, at whose risk it is retained by the vendor." And in *Joyce* v. *Adams*, 8 N. Y. 291–296, it was said: "It is a general rule of law that where a contract is made for the purchase of goods, and nothing is said about payment or delivery, the property passes immediately, so as to cast upon the purchaser all future risk, if nothing further remains to be done to the goods, although he cannot take them away without paying the price. But if anything remains to be done on the part of the seller, as between him and the buyer, such as weighing, measuring, or counting out of a common parcel, before the goods purchased are to be delivered, until that is done the right of property has not attached to the buyer, and the future risk, of course, remains with the seller." In *Bissell* v. *Balcom*, 39 N. Y. 275–279, it was said: "To the binding legal effect of such a sale, at the common law, delivery of the property is not necessary to vest the title in the purchaser, or to place the property at his risk, nor is it necessary that actual payment of any part of the price should be made. On the contrary, the sale may be perfect, the title pass, and the property be at the risk of the purchaser, and yet the vendor retain the possession, and have complete right to retain the possession until the price is paid, and to compel payment before delivery." Thus if part of the price be paid when the sale is made, and no express stipulation as to time of payment of the remainder is made, it is due upon delivery; and if the seller is prevented from making delivery by the act of God, he may, however, recover the remainder of the price from the buyer: *Sweeney* v. *Owsley*, 14 B. Mon. 413.

Or where goods are sold and delivered, to be paid for on the happening of some event, the vendor may recover, though the event on which payment is made to depend has been made impossible by the happening of an accident. Thus, where all the wood standing upon a certain lot was purchased at so much per cord, to be cut and hauled by the purchaser, measured in his yard, and paid for after measurement, and after a part of the wood had been cut and hauled, a large part remained on the land, and was there burned, the court decided that the sale was complete, and that the seller could recover the price of the wood burned, upon proof of its quantity: *Upson* v. *Holmes*, 51 Conn. 500. So where a specific lot of sheep are sold, to be delivered and paid for in the future, and before delivery, and while in the possession of the seller, they are injured without his fault, he may nevertheless recover the price of the sheep: *Barrow* v. *Window*, 71 Ill. 214. So where one buys goods to be delivered and paid for at a certain time, and before that time they are destroyed by flood, he must bear the loss: *Black* v. *Webb*, 20 Ohio, 304; 55 Am. Dec. 456. Where one buys a quantity of barley in the vendor's storehouse, at a certain price per bushel, the quantity to be afterwards ascertained, and the vendor agreeing that it may remain until a future day named,

when the possession of the storehouse would pass to another party, with whom the vendee agreed that the grain might remain on storage after the day mentioned, and after such change of possession the storehouse and grain were burned, it was decided that there had been a sale and delivery, and that the loss occasioned by the fire must be borne by the vendee: *Olyphant* v. *Baker*, 5 Denio, 379. And where one contracts with another to buy all his spring lambs at a certain price to be paid, the seller to pasture them until called for, the title passes to the purchaser, without specifically setting the property apart, and if, without the seller's fault, it suffers injury, the loss falls on the purchaser: *Bertelson* v. *Bower*, 81 Ind. 512. So where, upon the sale of a colt, the parties agree that it shall run with its dam, which is in the possession and is the property of the seller, until it is weaned, and then be delivered to the purchaser upon payment of the price, the title to the colt passes at once to the purchaser, and its subsequent safe-keeping is at his risk, and he remains liable for the price: *Henline* v. *Hall*, 4 Ind. 189. So upon a sale of a certain quantity of wheat at ten cents per bushel less than the Milwaukee price should be on any day thereafter which the seller should name, and after the delivery of the wheat it was destroyed by fire before the day with reference to which the price should be determined had been named by the seller, it was decided that the title to the wheat was in the purchaser, and that the seller was entitled to the price upon naming the day with reference to which the price should be fixed: *McConnell* v. *Hughes*, 29 Wis. 537. And again, upon the sale of an entire quantity of butter at a certain price per pound, the purchaser to take and pay for part at once, and to take and pay for the remainder in thirty days, and after taking the first lot the remainder was destroyed by fire, without the fault of the seller, it was decided that the purchaser was liable for the lot burned: *Seckel* v. *Scott*, 66 Ill. 106. So where the seller raised tobacco on shares on the purchaser's farm, where it was stored, and sold his share of it to him at a certain price per pound, stipulating that when the purchaser sold the tobacco the seller was to receive all in excess for his share that the tobacco should bring above the price agreed upon, after deducting expenses, and before it was sold by the purchaser the whole crop was destroyed by flood, it was determined that the purchaser was liable to the seller for the first price agreed upon: *Ruthrauff* v. *Hagenbuch*, 58 Pa. St. 103. So where a buyer purchases or orders a specific quantity of goods to be shipped to him from a distant place, and the seller delivers them to a vessel designated by the buyer, or in the absence of such designation, to a common carrier, the mere fact that the goods are to be paid for by note or in cash, upon arrival, does not prevent the title from passing. The goods are the property of the buyer and at his risk from the time they are placed in the hands of the carrier: *Farmers' Phosphate Co.* v. *Gill*, 69 Md. 537; 9 Am. St. Rep. 443; and to the same effect, *Mee* v. *McNider*, 109 N. Y. 500.

Under conditional sales, where the title to the property is to remain in the seller until the purchase price is fully paid, while the possession passes to the purchaser at the time of sale, there seems to be an irreconcilable conflict in the authorities as to which party should bear the loss in case the property is lost or destroyed, without the fault of the seller, before the last payment of the purchase price is made. It seems to us that the better reasoning is in favor of the rule adopted in the case of simple sales, and that the loss should be borne by the purchaser.

This is the doctrine stated in *Burnley* v. *Tufts*, 66 Miss. 540, 14 Am. St. Rep. 540, from which the rule adopted in the principal case was drawn.

Where the purchaser unconditionally and absolutely promises to pay a cer-

tain sum for personal property, the title to which is to remain in the seller until the full price is paid, the fact that the property is destroyed by fire before the time for the last payment to be made arrives, and while in the custody of the buyer, will not relieve him from the payment of the full price agreed upon. In *Randle* v. *Stone*, 77 Ga. 501, the facts of which are given in the note to *Burnley* v. *Tufts*, 14 Am. St. Rep. 541, the court was of an entirely different opinion, and there decided that in an exactly similar case the loss must be borne by the seller, because the title remained in him. So in *Swallow* v. *Emery*, 111 Mass. 355, the rule adopted in *Randle* v. *Stone*, 77 Ga. 501, prevailed. Chapman, C. J., in delivering the opinion, said: "It appears that the plaintiff delivered the horses, wagon, and harnesses to Waby to be used, and under a contract of sale when the stipulated price should be paid. The price was to be a gross sum for the whole property, and payable in labor. The articles were to remain the property of the plaintiff till the whole amount should be paid. After the payment, the plaintiff was to give Waby a bill of sale. The loss of one of the horses by its death, without any fault on the part of Waby, was the plaintiff's loss, and disabled him from performing the contract on his part; nor would he be entitled to receive the gross sum for the rest of the property. By retaining the property that remained, Waby would be liable to pay for that property, and not the gross sum agreed upon for the whole."

In *Stone* v. *Waite*, 88 Ala. 599, it was decided that under an executory sale of a stock of goods, at a price to be ascertained on taking an inventory, one half to be paid immediately, a note given for the remainder, and the title retained by the seller until such conditions were performed, the accidental loss of the goods by fire, after the completion of the inventory and the delivery of the key to the store to the purchaser, but before the first payment was made or the note for the balance given, falls on the seller, who cannot recover the price nor the money deposited by the buyer as a forfeit; the fire, however, excuses the seller from performing his contract, and the buyer cannot recover a forfeit deposited by the former.

NORFOLK NATIONAL BANK *v.* GRIFFIN.

[107 NORTH CAROLINA, 173.]

NEGOTIABLE INSTRUMENTS — ACCOMMODATION PAPER — LIABILITY OF MAKER AFTER INDORSEMENT. — A note made payable by the maker to himself, and signed by others as accommodation paper, to enable such maker to raise money thereon, and indorsed by him for that purpose, may be enforced, not only as against such maker and indorser, but also as against the other accommodation makers.

ACTION upon the following note:—

"Sixty days after date, we jointly and severally promise to pay Griffin and Temple, negotiable and payable without offset, at the Norfolk National Bank, four hundred dollars, for value received. (Signed) "J. W. GRIFFIN.
"W. O. TEMPLE.
"J. R. ETHERIDGE.
"W. S. TEMPLE."

The first two makers were partners, and Etheridge and W. S. Temple received no benefit from the note, they having signed as accommodation makers, to enable Griffin and Temple to raise money on the note. Griffin and Temple indorsed the note for value to plaintiff, and it remains unpaid. Judgment for plaintiff against all of the makers of the note, and Etheridge and W. S. Temple appeal.

E. F. Aydlett, for the appellants.

Pruden and Vann, for the respondent.

CLARK, J. A bond made payable to the obligor is void: *Pearson* v. *Nesbit*, 1 Dev. 315; 17 Am. Dec. 568; *Justices* v. *Shannonhouse*, 2 Dev. 6; *Justices* v. *Armstrong*, 3 Dev. 285. A bond is a deed, and no man can execute and deliver a deed to himself.

"According to common-law principles, a promissory note made payable by a person to himself creates, of itself, no liability upon him to pay it. This is so, not for the reason that it is contrary to public policy, immoral, or illegal, but because a person cannot contract with himself": *Jenkins* v. *Bass*, 88 Ky. 397; 21 Am. St. Rep. 344. Indeed, there is no contract till such paper has been indorsed over to another, when there springs up by the law merchant a valid contract between the maker and indorsee: 1 Daniel on Negotiable Instruments, sec. 130; *Wood* v. *Maytton*, 10 Ad. & E. 809 (59 Eng. Com. L.); *Smith* v. *Lusher*, 5 Cow. 688; *Plets* v. *Johnson*, 3 Hill, 112; *Jenkins* v. *Bass*, 88 Ky. 397; 21 Am. St. Rep. 344.

In this case, the note, upon its face, was executed for the purpose of being negotiated. It is found as a fact that the defendants signed it as accommodation paper, to enable those of the makers who are named as payees therein to raise money on the paper. Doubtless they were so named as payees because it was not yet known who would lend money on the note, and it was desired not to leave the names of payees in blank. Such practice is not unusual, and is well recognized by the law merchant.

The note was negotiated, as defendants intended should be done, and value received thereon. To protect them, upon the technical grounds set up, against the consequences of their own act would be against good morals, and would enable them to perpetrate a fraud on the plaintiff. By the indorsement to plaintiff, the contract, till then imperfect, became perfect and completed.

No error.

NEGOTIABLE INSTRUMENTS — ACCOMMODATION PAPER — LIABILITY OF MAKER AFTER INDORSEMENT. — Where a note is drawn and indorsed for the accommodation of the indorser, who gives a bond of indemnity to the maker, the latter will not be discharged: *Bank of Montgomery* v. *Walker*, 9 Serg. & R. 229; 11 Am. Dec. 709, and note. The accommodation maker of a note is liable to pay it according to its tenor, and cannot allege that he was a mere surety: *Stephens* v. *Monongahela etc. Bank*, 88 Pa. St. 157; 32 Am. Rep. 438.

HAWES *v.* BLACKWELL.

[107 NORTH CAROLINA, 196.]

BANKS AND BANKING — DEPOSIT. — When a bank, in the course of business, receives deposits of money, in the absence of any agreement to the contrary, it at once becomes the money of the bank as part of its general funds, and can be used by it for any purpose for which it may use money otherwise acquired.

BANKS AND BANKING — RELATION BETWEEN BANK AND DEPOSITOR. — A depositor, when he makes a deposit, becomes a creditor of the bank, and the latter becomes his debtor, for the amount of money deposited, agreeing to discharge the debt so created by honoring and paying the checks or orders drawn upon it by the depositor, when presented, not exceeding the amount deposited.

BANKS AND BANKING. — RELATION BETWEEN BANK AND DEPOSITOR is that of debtor and creditor, and has none of the elements of a trust about it. The bank does not assume to become a fiduciary as to the money deposited, nor does it agree to hold it in trust for the depositor.

BANKS AND BANKING — RIGHTS OF CHECK-HOLDER OR PAYEE. — The payee or holder of a check for part of a deposit cannot, in the absence of ground for equitable relief, maintain his separate action against the bank for non-payment on presentation, until the bank has accepted the check or agreed to pay it. He, however, has his remedy against the drawer, or they may jointly recover against the bank, subject to its rights of set-off against the depositor, and to pay all his outstanding checks of which it has notice before such check is presented.

BANKS AND BANKING — RIGHTS OF CHECK-HOLDER. — A check, as to the drawer thereof, is an assignment to the holder of the deposit to the amount specified in the check, but it does not create a lien as against the bank. The holder simply has an interest in the deposit, subject to the bank's right of set-off against the depositor, and to pay his outstanding checks received and paid before notice.

BANKS AND BANKING — RIGHTS OF CHECK-HOLDER. — A check for the whole of a deposit is an assignment of the depositor's whole debt against the bank, and entitles the holder to maintain his separate action therefor against the bank upon presentation of the check and refusal of payment, subject to the bank's right of set-off against the depositor, and to pay his outstanding checks received and paid before notice.

BANKS AND BANKING — REMEDY OF CHECK-HOLDER. — The drawer of a check agrees that it will be paid by the bank when duly presented for payment, and upon refusal by the bank to pay, the holder has his remedy against the drawer for his breach of contract.

BANKS AND BANKING — DEPOSIT — ASSIGNMENT OF, BY BANK. — The money of a general depositor in a bank is the property of the bank, and subject to assignment by it for the benefit of creditors.

BANKS AND BANKING — ASSIGNMENT OF DEPOSIT — RIGHT OF CHECK-HOLDER. — The holder of a check drawn before, and presented for payment after, an assignment by the bank for the benefit of creditors is not entitled to the amount thereof as against the assignee. He is only entitled, as against him, to his *pro rata* share of the fund remaining after the payment of preferred creditors, while as against the drawer he is entitled to have so much of his deposit as is named in the check set apart for its payment, subject to the rights of the bank and its assignee.

ACTION upon a check drawn by J. W. Blackwell on the Bank of Durham, in favor of S. H. Hawes, or order, for $508.80. At the time that the check was drawn, J. W. Blackwell was a depositor for more than the amount named therein in the Bank of Durham, owned and conducted by W. T. Blackwell. After the check was drawn, but before it was presented, refused payment, and protested, W. T. Blackwell assigned in trust for the benefit of creditors, making the general depositors of the bank a class of fifth preferred creditors. At the time that such check was presented for payment, the amount in the bank to the credit of J. W. Blackwell, as a general depositor, far exceeded the amount named therein. After the check was drawn, and before it was presented for payment, J. W. Blackwell assigned for the benefit of creditors. The check was not preferred in this assignment, and the estate of the assignor was not sufficient to pay it, or any part thereof, while the estate of W. T. Blackwell is sufficient to pay the depositors of the bank in full. W. T. Blackwell's assignees took possession of his estate without notice of the existence of the check, and before its presentment, although they had notice of J. W. Blackwell's assignment before that time, and the latter's assignees took possession of his estate, and had notice of W. T. Blackwell's assignment, before the presentment of the check or their knowledge of its existence. In this action by Hawes against J. W. Blackwell and his assignees, and W. T. Blackwell and his assignees, the court decreed, upon the facts stated, that plaintiff recover of defendants the amount, with interest, remaining unpaid upon the check to be paid out of the funds of the Bank of Durham, or W. T. Blackwell, due to the account of J. W. Blackwell as a depositor in such bank. Defendants appealed from this judgment.

W. W. Fuller, for the appellants.

J. S. Manning, for the respondent.

MERRIMON, C. J. When a bank, in the course of its business, receives deposits of money, in the absence of any agreement to the contrary, the money deposited with it at once becomes that of the bank, part of its general funds, and can be used by it for any purpose, just as it uses, or may use, its moneys otherwise acquired. The depositor, when, and as soon as, he so makes a deposit, becomes a creditor of the bank, and the latter becomes his debtor, for the amount of money deposited, agreeing to discharge the debt so created by honoring and paying the checks or orders the depositor may, from time to time, draw upon it, when presented, not exceeding the amount deposited. The relation of the bank and depositor is simply that of debtor and creditor, the debt to be discharged punctually, in the way just indicated. The contract between them, whether express or implied, is legal in its nature, and there is no element or quality in it different from the same in ordinary agreements or promises founded upon a valuable consideration to pay a sum of money, specified or implied, to another party. There are none of the elements of a trust in it. The bank does not assume or become a fiduciary as to the money deposited for the depositor, nor does it agree to hold a like sum in trust for him: *Boyden* v. *Bank*, 65 N. C. 13; *Bank* v. *Millard*, 10 Wall. 152; *Laclede Bank* v. *Schuler*, 120 U. S. 511.

Hence if the bank should fail to pay its depositor, when called upon to do so, the latter would have his remedy by proper action, just as in the ordinary case where the debtor refused to pay his creditor the debt he owed him. If the depositor should draw his check on the bank for some part of his deposit, — the debt the bank owed him, — the payee, or holder of such check, could not maintain his separate action against the bank for non-payment of the check on presentation of the same for payment; it could not, until the bank accepted the check or agreed to pay it. Then, and not till then, would the bank become his debtor in his sole right as against it. The check, however, in the hands of the payee thereon, or the holder thereof, would have an interest in the deposit, as against the drawer, to the amount specified in the check, subject to the right of the bank to pay all oustanding checks of the depositor, and such as he might subsequently draw, and which might be paid before it had notice of the check in question, and subject to the right of the bank to set off debts due which the depositor might owe at the time such check should be presented. The check, as to drawer thereof,

is, in effect, an assignment to the holder thereof to the amount specified in the check; and under the method of civil procedure in this state, the depositor and the holder of the check might jointly maintain an action against the bank for the deposit, in case it failed to pay the same when called upon, and they might recover, subject to the rights of the bank, as above explained. And so, also, if the depositor had given his check for the whole of his deposit, the holder might maintain his separate action against the bank if it refused to pay the same, subject to its rights as to checks on the deposit paid before notice of such check, and likewise subject to its rights of set-off. This is so, because the check for the whole deposit would be, in effect, an assignment of the depositor's whole debt against the bank to the holder of such check. He, being the real owner of the deposit, — the debt, — might sue for it in his own name. And a holder of a check for a part of a deposit might, in some cases, have appropriate equitable relief, as against the depositor and the bank, if they should seek to impair his rights as the equitable owner, against the drawer of part of the deposit. Such check makes the holder thereof part owner of the deposit, as against the drawer, subject to the rights of the bank. The depositor agrees, in effect, by implication of law, to set apart so much of his deposit as is specified in the check, for the holder thereof. As against the drawer, that much of the deposit belongs to the drawee. If, however, it turns out that the check is not paid by the bank, on due presentation for payment, the holder of the check will have his remedy against the drawer. The depositor — the drawer — agrees that the check will be paid by the bank when it shall be duly presented to it for payment, and if it shall not be, then there will be a breach of the drawer's contract with the holder of the check: *Kahnweiler* v. *Anderson*, 78 N. C. 133; *Nimocks* v. *Woody*, 97 N. C. 1; 2 Am. St. Rep. 268; *Brem* v. *Covington*, 104 N. C. 589; *Spain* v. *Hamilton's Adm'r*, 1 Wall. 604, 624; *Laclede Bank* v. *Schuler*, 120 U. S. 511; Morse on Banking, sec. 496.

Now, in the present case, the depositor of the Bank of Durham, James W. Blackwell, was the simple creditor of that bank to the amount of his deposit; it owed him a debt for that sum, just as it owed its creditors other than its depositors. It did not hold the money he deposited, or any part of its moneys, in special trust for him, or for any person to whom he gave checks on the bank. The owner of the bank, the defendant William T. Blackwell, might sell, assign, and trans-

fer all his property, including all the assets of the bank, as he did do, to the defendant's trustees for his creditors, including the deposits of general depositors in the bank, and the latter were on the same footing as other creditors, except as he classified them and preferred certain classes over others in the trust created for their benefit. The depositor, James W. Blackwell, might have maintained his action against the bank to recover from it the amount of his deposit therein, when and as soon as it failed and refused to pay him the same. The present plaintiff might have joined him in such action, because he had, in effect, assigned to the plaintiff part of the deposit, a part equal to the amount of the check. But the plaintiff could not have maintained a separate action against the bank for the amount of the check, because the bank did not accept and agree to pay it, nor did the plaintiff have any equitable or other lien upon the assets of the bank. It was not charged with a particular trust in favor of the plaintiff. He was on no better footing than any other creditor of the bank. The plaintiff might have maintained his action against the drawer of the check, the subject of the action, because the drawer, in legal effect, contracted with him that the check would be paid on presentation to the bank, and it was not so paid. He can maintain this action against the defendant drawer of the check because of such breach of contract. Moreover, such drawer, when he drew the check in favor of the plaintiff, in effect sold and assigned to him a part of his particular deposit — his debt against the bank — equal to the sum of money specified in the check. Hence if the plaintiff shall recover against the drawer of the check in question, he will be entitled, in equity, to share in whatever sum shall be paid to such drawer, or the defendant's trustees for his creditors, on account of his deposit in the Bank of Durham by the trustees of William T. Blackwell. This is so, because the drawer, James W. Blackwell, as we have seen, in legal effect specially set apart so much of his deposit as was equal to the amount of the check drawn in favor of the plaintiff to pay it. The ground of the plaintiff's recovery from the defendant James W. Blackwell is, that the latter drew the check on the bank in favor of the plaintiff, and thereby agreed that the bank would pay the same when presented for payment. But the bank did not pay the check, and the plaintiff's action at once accrued against the drawer, as we have seen, upon such breach of contract. The plaintiff may recover, for such

breach, the amount of the check, and he has a right to have so much of the drawer's deposit as was specially set apart to pay the check applied to the payment of his judgment against the drawer, because that part of the deposit was devoted to the purpose of paying the check.

For the reasons stated, the plaintiff is not entitled to recover judgment against William T. Blackwell and the defendant's trustees for his creditors on account of the plaintiff's check, nor against the defendant's trustees for the creditors of James W. Blackwell. He is entitled to recover judgment against James W. Blackwell for the amount of his check, and to have it adjudged that so much of the dividends in the hands of the defendant's trustees for the creditors of William T. Blackwell as shall be paid on account of the deposit of James W. Blackwell as will be equal to the *pro rata* share thereof in favor of the check of the plaintiff be applied to the payment of the plaintiff's judgment, so far as the same may be adequate; and to have it further adjudged that the defendant trustees of the creditors of the defendant James W. Blackwell shall allow such judgment to share in the assets in their hands in the class of creditors to which it shall belong by the terms of the deed of trust, whose provisions they are charged to execute; and further, to pay out of the dividends they have received from the defendant's trustees for the creditors of William T. Blackwell, on account of such deposit of the defendant James W. Blackwell, the *pro rata* share of the check of the plaintiff in such dividends to the credit of the plaintiff's judgment, so far as the same may be adequate.

There is error. The judgment must be corrected as directed in this opinion, and when so corrected, affirmed. To that end, let this opinion be certified to the superior court. It is so ordered.

BANKS AND BANKING. — RELATION BETWEEN A BANK AND A DEPOSITOR is that of debtor and creditor, and the former impliedly contracts to pay out the money deposited only upon the check or order of the latter: *Shipman* v. *Bank of State of New York*, 126 N. Y. 318; *ante*, p. 821, and note.

BANKS AND BANKING. — CHECKS, WHETHER OPERATE AS AN ASSIGNMENT OF THE DRAWER'S FUND, or a part thereof, in the bank against which they are drawn: See note to *Hemphill* v. *Yerkes*, 19 Am. St. Rep. 609–612, wherein is discussed the remedies of a check-holder upon the refusal of the bank to pay his check.

BANKS AND BANKING — DEPOSITS. — The simple deposit of money in a bank on account is a general deposit, and transfers the ownership of the funds to the bank: *Boettcher* v. *Colorado Nat. Bank*, 15 Col. 16; *Atlantic Nat.*

fer all his property, including all the assets of the bank, as he did do, to the defendant's trustees for his creditors, including the deposits of general depositors in the bank, and the latter were on the same footing as other creditors, except as he classified them and preferred certain classes over others in the trust created for their benefit. The depositor, James W. Blackwell, might have maintained his action against the bank to recover from it the amount of his deposit therein, when and as soon as it failed and refused to pay him the same. The present plaintiff might have joined him in such action, because he had, in effect, assigned to the plaintiff part of the deposit, a part equal to the amount of the check. But the plaintiff could not have maintained a separate action against the bank for the amount of the check, because the bank did not accept and agree to pay it, nor did the plaintiff have any equitable or other lien upon the assets of the bank. It was not charged with a particular trust in favor of the plaintiff. He was on no better footing than any other creditor of the bank. The plaintiff might have maintained his action against the drawer of the check, the subject of the action, because the drawer, in legal effect, contracted with him that the check would be paid on presentation to the bank, and it was not so paid. He can maintain this action against the defendant drawer of the check because of such breach of contract. Moreover, such drawer, when he drew the check in favor of the plaintiff, in effect sold and assigned to him a part of his particular deposit — his debt against the bank — equal to the sum of money specified in the check. Hence if the plaintiff shall recover against the drawer of the check in question, he will be entitled, in equity, to share in whatever sum shall be paid to such drawer, or the defendant's trustees for his creditors, on account of his deposit in the Bank of Durham by the trustees of William T. Blackwell. This is so, because the drawer, James W. Blackwell, as we have seen, in legal effect specially set apart so much of his deposit as was equal to the amount of the check drawn in favor of the plaintiff to pay it. The ground of the plaintiff's recovery from the defendant James W. Blackwell is, that the latter drew the check on the bank in favor of the plaintiff, and thereby agreed that the bank would pay the same when presented for payment. But the bank did not pay the check, and the plaintiff's action at once accrued against the drawer, as we have seen, upon such breach of contract. The plaintiff may recover, for such

breach, the amount of the check, and he has a right to have so much of the drawer's deposit as was specially set apart to pay the check applied to the payment of his judgment against the drawer, because that part of the deposit was devoted to the purpose of paying the check.

For the reasons stated, the plaintiff is not entitled to recover judgment against William T. Blackwell and the defendant's trustees for his creditors on account of the plaintiff's check, nor against the defendant's trustees for the creditors of James W. Blackwell. He is entitled to recover judgment against James W. Blackwell for the amount of his check, and to have it adjudged that so much of the dividends in the hands of the defendant's trustees for the creditors of William T. Blackwell as shall be paid on account of the deposit of James W. Blackwell as will be equal to the *pro rata* share thereof in favor of the check of the plaintiff be applied to the payment of the plaintiff's judgment, so far as the same may be adequate; and to have it further adjudged that the defendant trustees of the creditors of the defendant James W. Blackwell shall allow such judgment to share in the assets in their hands in the class of creditors to which it shall belong by the terms of the deed of trust, whose provisions they are charged to execute; and further, to pay out of the dividends they have received from the defendant's trustees for the creditors of William T. Blackwell, on account of such deposit of the defendant James W. Blackwell, the *pro rata* share of the check of the plaintiff in such dividends to the credit of the plaintiff's judgment, so far as the same may be adequate.

There is error. The judgment must be corrected as directed in this opinion, and when so corrected, affirmed. To that end, let this opinion be certified to the superior court. It is so ordered.

BANKS AND BANKING. — RELATION BETWEEN A BANK AND A DEPOSITOR is that of debtor and creditor, and the former impliedly contracts to pay out the money deposited only upon the check or order of the latter: *Shipman* v. *Bank of State of New York*, 126 N. Y. 318; *ante*, p. 821, and note.

BANKS AND BANKING. — CHECKS, WHETHER OPERATE AS AN ASSIGNMENT OF THE DRAWER'S FUND, or a part thereof, in the bank against which they are drawn: See note to *Hemphill* v. *Yerkes*, 19 Am. St. Rep. 609–612, wherein is discussed the remedies of a check-holder upon the refusal of the bank to pay his check.

BANKS AND BANKING — DEPOSITS. — The simple deposit of money in a bank on account is a general deposit, and transfers the ownership of the funds to the bank: *Boettcher* v. *Colorado Nat. Bank*, 15 Col. 16; *Atlantic Nat.*

Bank v. *Burke*, 81 Ga. 597; *Spilman* v. *Payne*, 84 Va. 435. But special deposits do not become the property of the bank; they must be kept safely until drawn out upon the order of the depositor: *Cutler* v. *American Nat. Bank*, 113 N. Y. 593; such as bonds deposited for safe-keeping: *Bowers* v. *Evans*, 71 Wis. 133; *Francis* v. *Evans*, 69 Wis. 115; or collaterals deposited with a bank for the payment of a certain debt specified: *Loyd* v. *Lynchburg Nat. Bank*, 86 Va. 690.

BANKS AND BANKING — DEPOSITS, CHARACTER OF, CONTROLS THE RIGHTS OF HOLDERS OF CHECKS DRAWN AGAINST THEM. — A deposit is not general, but a trust fund, when there is an express agreement to that effect, or circumstances which give to the transaction the nature of a special deposit: *Boettcher* v. *Colorado Nat. Bank*, 15 Col. 16.

BANKS AND BANKING — CHECKS — REMEDY OF HOLDER. — Without privity of contract, acceptance, or circumstances showing an intent of the bank to accept a check drawn by a general depositor, the payee cannot recover against the drawee: *Boettcher* v. *Colorado Nat. Bank*, 15 Col. 16. A check is revocable before its presentation for payment, unless the bank upon which it is drawn has accepted or certified it; *Kahn* v. *Walton*, 46 Ohio St. 196; *Louisville etc. Co.* v. *Paine*, 67 Miss. 678.

CARDEN *v.* CARDEN.

[107 NORTH CAROLINA, 214.]

ATTACHMENT AGAINST NON-RESIDENT. — Where one voluntarily removes from one state to another for the purpose of discharging the duties of an office of indefinite duration, which requires his continued presence there for an unlimited time, he becomes a non-resident of the former state for the purposes of attachment, although he may occasionally visit that state, and entertain an intent to return and reside there at some uncertain time.

ATTACHMENT AGAINST NON-RESIDENT. — A non-resident's property is attachable when his residence is not such as to subject him personally to the jurisdiction of the court, and thus place him upon equality with the other residents of the state.

ATTACHMENT. The defendant, a Methodist minister, prior to 1884 owned and resided upon land in North Carolina. In March, 1884, he was transferred to Maryland for pastoral work therein, and there remained until 1889. He always regarded the former state as his home, intended to return and reside there, and did visit there at least once each year, from 1884 to 1889, when he returned to continuously reside therein. Some time during defendant's absence in Maryland, plaintiff caused his land in North Carolina to be attached, and at the trial recovered a verdict. Defendant, after such verdict, and before judgment, moved the court to vacate the attachment, claiming to be a resident of the latter state, and entitled to

a homestead in the land. Upon the trial of the issue, the court granted the motion on the ground stated. Plaintiff appealed.

R. W. Winston, for the appellant.

J. S. Manning, for the respondent.

SHEPHERD, J. The single question presented by this appeal is, whether, upon the facts found, the attachment should have been dissolved.

We are unable to distinguish this case from that of *Wheeler* v. *Cobb*, 75 N. C. 21. It is there said that, "without deciding who, in law, is a non-resident in other respects, but confining the decision to the construction of this statute, the conclusion is, that where one voluntarily removes from this to another state for the purpose of discharging the duties of an office of indefinite duration, which required his continued presence there for an unlimited time, such a one is a non-resident of this state for the purposes of an attachment, and that notwithstanding he may occasionally visit this state, and may have the intent to return at some uncertain, future time."

The prominent idea is, "that the debtor must be a non-resident of this state, where the attachment is sued out, not that he must be a resident elsewhere. The essential charge is, that he is not residing or living in the state; that is, he has no abode or home within it where process may be served so as effectually to reach him. In other words, his property is attachable, if his residence is not such as to subject him personally to the jurisdiction of the court, and place him upon equality with other residents in this respect": Waples on Attachment, 35. We cannot understand how these latter conditions could have existed when the defendant was living in Maryland, visiting this state only once or twice a year, and with only a general intention of returning at some indefinite time and making his home here. Non-residence, within the meaning of the attachment law, means the "actual cessation to dwell within a state for an uncertain period, without definite intention as to a time for returning, although a general intention to return may exist": *Weitkamp* v. *Loehr*, 53 N. Y. Sup. Ct. 83.

Reversed.

ATTACHMENT, GROUNDS FOR — NON-RESIDENCE OF DEFENDANT. — A debtor may remain out of the state such a length of time and under such circumstances as to be a non-resident, such as is meant by the term "non-resi-

dent" in statutes relating to attachments, even though, by reason of his intention to return, his domicile is still in the state; yet a mere temporary absence of a debtor, on business or for pleasure, will not constitute him a non-resident, although he may not have a house of usual abode in the state where a writ of summons may be served upon him during such absence: *Keller* v. *Carr*, 40 Minn. 428. Compare *Haggart* v. *Morgan*, 5 N. Y. 422; 55 Am. Dec. 350, and note 355, 356; *Dorsey* v. *Kyle*, 30 Md. 512; 96 Am. Dec. 61, and note.

FOLLETTE v. UNITED STATES MUTUAL ACCIDENT ASSOCIATION.

[107 NORTH CAROLINA, 240.]

INSURANCE — SUPPRESSION OF MATERIAL FACTS — WAIVER BY COMPANY — EVIDENCE. — In an action to recover on an accident insurance policy, which is resisted on the ground that the insured suppressed the fact of his deafness by stating that he was free from any bodily infirmity at the time he was insured, the actual knowledge of such deafness by the insurer's agent at the time is constructive notice of it to his principal, and constitutes a waiver of objection that the deafness was a bodily infirmity, although the policy provided that such agent should have no power to waive its conditions. Hence evidence that such agent knew or ought to have known of such deafness when he solicited and secured the policy is admissible.

INSURANCE — WAIVER OF REPRESENTATIONS AS TO BODILY INFIRMITY — EVIDENCE. — An application for insurance constitutes part of the contract between the insurer and the insured, and the representations contained in it are, presumptively, inducements to the former to enter into it. But when it appears that an agent, through whom the company acts, himself examined or frequently conversed with the applicant, who was partially deaf, had opportunity to test the extent of his infirmity, and afterwards solicited, or forwarded with favorable recommendation, his application for insurance against accident, the insured is not precluded from showing the fact as evidence that the insurer knew of and assented to the defective hearing, and waived objection to the risk on account of it.

ACTION upon an accident policy. At the trial, plaintiff proved the injury, and testified that he had been partially deaf for thirty years; that he was otherwise in good health, and that his deafness did not interfere with his business, although a person conversing with him had to elevate his voice above an ordinary tone to enable him to hear; that he was well acquainted with the agent of the insurer who took his application and solicited his insurance, and had often conversed with him; that such agent had had opportunity to know the extent of his deafness when applying for the policy; that no question was asked about deafness at that time, and

that he did not consider his deafness a bodily infirmity, nor intend to suppress the fact thereof when he said in his application, "I have never had nor am I subject to fits, disorders of the brain, rheumatism, or any bodily or mental infirmity, except as herein stated; had an attack of rheumatism six years ago." The insurer's local agent, heretofore mentioned, testified that he took plaintiff's application for insurance, and delivered the policy to him. He was then asked if at that time he knew the extent of plaintiff's deafness, if he had frequently conversed with him prior to that time, and if any questions were asked plaintiff by him at that time about his deafness, or his attention called to it in any way. The question was excluded, and plaintiff excepted. The policy in question contained a condition that fraud or concealment in procuring it would render it void, and that agents should not waive any of the conditions of the policy without the written consent of the insurer in writing. The court instructed the jury to return a verdict for defendant on the ground that plaintiff's deafness constituted a bodily infirmity which he had suppressed in his application, though without intent to defraud, and though such deafness did not contribute to the injury. After verdict in accordance with such instruction, and judgment thereon, plaintiff appealed.

W. W. Fuller and R. B. Boone, for the appellant.

J. S. Manning and J. W. Hinsdale, for the respondent.

AVERY, J. It was competent to prove by the agent of the defendant, on his examination as a witness, that he knew, or had had abundant opportunity and good reason to know, the extent of plaintiff's deafness when he solicited him to take out a policy, or subsequently, and before the application was signed.

Actual knowledge of the plaintiff's defective hearing on the part of the agent was constructive notice of it to his principal, and hence the latter is deemed to have waived the objection that the deafness of the former was a bodily infirmity, notwithstanding the fact that it was provided in the policy that the agents of the company should have no power to waive its conditions: *Hornthal* v. *Western Ins. Co.*, 88 N. C. 73; *Dupree* v. *Virginia Home Ins. Co.*, 93 N. C. 240; 92 N. C. 422; *Collins* v. *Farmville Ins. etc. Co.*, 79 N. C. 284; 28 Am. Rep. 322; *Union Mut. L. Ins. Co.* v. *Wilkinson*, 13 Wall. 222; *Home Mut. F. Ins. Co.* v. *Garfield*, 60 Ill. 124; 14 Am. Rep. 27;

Witherell v. *Maine Ins. Co.*, 49 Me. 200; *American Central Ins. Co.* v. *McCrea*, 8 Lea, 513; 41 Am. Rep. 647; Wood on Insurance, sec. 496; *Morrison* v. *Wisconsin etc. Ins. Co.*, 59 Wis. 162; *Shafer* v. *Phœnix Ins. Co.*, 53 Wis. 361; *Westchester F. Ins. Co.* v. *Earle*, 33 Mich. 143.

An application for insurance constitutes a part of the contract between the insurer and the insured, and the representations contained in it are, presumptively, inducements to the former to enter into it. But when it appears that an agent, through whom a corporation acts, himself examined and valued, or had opportunity to estimate by examination actually made by him, the value of property insured against fire, or frequently conversed with a man partially deaf, had opportunity to test the extent of his infirmity, and afterwards solicited, or forwarded with favorable recommendation, his application for insurance against accident, the insured will not be absolutely precluded from showing the facts as evidence that the corporation assented to what subsequently appeared to be an overvaluation in the one case, or had knowledge of the defective hearing, and waived objection to the risk on account of it, in the other.

It was material that the jury, in passing upon and finding the facts upon which the liability of the defendant depended, should hear any testimony that would aid them in determining whether the defendant company was induced, or might reasonably have been induced, by the false representation contained in the application, to enter into the contract, when it would not have done so had its agents had full knowledge of the facts. The representation in the application must be, in contemplation of law, falsely and fraudulently made, in order to prevent a recovery in case of loss; but, in the absence of any proof of knowledge of the misrepresentation complained of, or waiver of objection on account of it by the agents of the insurer, a false statement constituting an apparent inducement to the contract will be deemed to have been made with fraudulent intent: *Mace* v. *Providence Life Ass'n*, 101 N. C. 133.

The courts of this country have differed widely as to the admissibility of testimony in cases like that before us. Some have held that parol testimony was not competent in a case to show a waiver of the requirements in the conditions of a policy, or of the warranty arising out of the application, while others have limited the power of agents to waive its

requirements, in the face of a prohibitory provision in the policy, to matters not constituting essential and material portions of the contract, such as the stipulations as to proof of loss. There is a very general concurrence, of course, in the view that where the execution of a contract has been procured by the fraud of an agent of the insurer, it may be declared void upon showing the acts of the agent inducing its execution.

This case is distinguishable from that of *Bobbitt* v. *Liverpool etc. Ins. Co.*, 66 N. C. 70, 8 Am. Rep. 494, in that in the latter the plaintiff not only made a false statement, which was an apparent inducement to the defendant to issue the policy, but failed to rebut the presumption of fraudulent purpose by showing any actual knowledge of the true value of the property on the part of the corporation acting through its agent.

In *Dupree* v. *Virginia Home Ins. Co.*, 93 N. C. 240, Chief Justice Smith, delivering the opinion of the court, said: "It was certainly competent to show this source of information possessed by the agency firm, in regard to the property included in both policies when they issued the last, as tending to rebut the charge that it was solely brought about by the fraudulent statements contained in the plaintiff's application." The evidence referred to tended to show that a subagent of a general insurance agent had, the year before, inspected the same property for another company for which the general agent was acting, and had issued a policy upon the valuation then declared just by the subagent, and the general agent had, the next year, sent the insured the policy sued on, which was issued in the name of another company upon the property destroyed by fire, but based upon the same valuation.

Under the principle laid down, it was equally competent and material to show that Mackey, the agent of the defendant company, knew and could have informed his principal that the plaintiff was partially deaf, and from the very nature of the case could have communicated the extent of the infirmity. Being presumably in possession of the information acquired by its agent, the company is not deemed to have been induced to take the risk by the representation in the application that the plaintiff was not subject to any "bodily infirmity."

The principles announced by this court in the cases already cited are supported by reason and sustained by authority: May on Insurance, secs. 131, 132; 1 Phillips on Insurance, sec. 904.

In *Hornthal* v. *Western Ins. Co.*, 88 N. C. 73, the court say that the policy "was issued and delivered to the plaintiff, with actual knowledge on the part of the agent and constructive knowledge of his principal, and must be deemed to have been done with the full assent to the proposed increase." See also *Collins* v. *Farmville Ins. etc. Co.*, 79 N. C. 279; 28 Am. Rep. 322; *Argall* v. *Ins. Co.*, 84 N. C. 355; *Dupree* v. *Virginia Home Ins. Co.*, 92 N. C. 417. "The powers of the agent are *prima facie* co-extensive with the business intrusted to his care, and will not be narrowed by the limitations not communicated to the person with whom he deals": *Union Mut. L. Ins. Co.* v. *Wilkinson*, 13 Wall. 222.

So in the case of *Cuthbertson* v. *North Carolina H. Ins. Co.*, 96 N. C. 480 (cited by the defendant), the insured made a false representation as to the title of the property destroyed by fire, and offered no testimony to trace any actual knowledge of the facts to the defendant, or to rebut the presumption of a fraudulent intent by a waiver.

Justice Davis, in *Mace* v. *Providence Life Ass'n*, 101 N. C. 133, says: "A false statement made in the application, when the application constitutes a part of the contract, will render the policy void, and so will any representation of a material fact by which the company is misled, if falsely and fraudulently made." But where there is a waiver, as in the cases of *Hornthal* v. *Western Ins. Co.*, 88 N. C. 73, and *Dupree* v. *Virginia H. Ins. Co.*, 92 N. C. 417, though the false statement be made in the application itself, it does not mislead, and it cannot be considered an inducement to the contract.

There was error, for which a new trial must be granted.

LIFE INSURANCE — APPLICATION, REPRESENTATIONS OR SUPPRESSIONS OF FACTS IN. — In entering into a contract of insurance, the insurer and insured must deal fairly with each other. Any concealment or misrepresentation of facts material to the risk, by either, will vitiate the contract: *New Era L. Ass'n* v. *Weigle*, 128 Pa. St. 577. Compare *Rawls* v. *American M. L. Ins. Co.*, 27 N. Y. 282; 84 Am. Dec. 280, and note; *Mallory* v. *Travelers Ins. Co.*, 47 N. Y. 52; 7 Am. Rep. 410, and note; note to *Continental L. Ins. Co.* v. *Rogers*, 59 Am. Rep. 816–822; note to *Day* v. *Mutual B. L. Ins. Co.*, 29 Am. Rep. 575–578; *Maine B. Ass'n* v. *Parks*, 81 Me. 79; 10 Am. St. Rep. 240, and note as to when a warranty of "good health" is not broken by a person's undisclosed disorder or ailment. Mere temporary ailments not tending to undermine one's general health, at the time of application for a policy of life insurance, do not vitiate the policy: *Pulritzky* v. *Supreme Lodge K. of H.*, 76 Mich. 428; *Brown* v. *Insurance Co.*, 65 Mich. 306. Where a policy declares that representations made in an application are warranted to be true, and that the policy is void if they are false, their falsity will vitiate the policy:

Glutting v. *Metropolitan L. Ins. Co.*, 50 N. J. L. 287. A misrepresentation, in an application, of a fact not material to the risk does not avoid a policy issued thereon: *Mutual B. L. Ins. Co.* v. *Daviess*, 87 Ky. 542.

INSURANCE — AGENT — WAIVER OR ESTOPPEL. — Where an agent, with full knowledge of all the facts, induces an applicant for a policy of life insurance to make untrue answers in his application, the company is estopped to seek an avoidance of the contract, where there is no fraud on the part of the insured: *Mutual B. L. Ins. Co.* v. *Daviess*, 87 Ky. 542; *Keystone M. B. Ass'n* v. *Jones*, 72 Md. 363. And the same rule applies where an agent makes false answers in the application himself, after having been correctly informed of the real facts by the applicant: *Temmink* v. *Metropolitan L. Ins. Co.*, 72 Mich. 388; *Michigan M. L. Ins. Co.* v. *Reed*, 84 Mich. 525.

YOUNG *v.* WESTERN UNION TELEGRAPH COMPANY.

[107 NORTH CAROLINA, 370.]

TELEGRAPH COMPANY — NEGLIGENCE — LIABILITY TO RECEIVER OF MESSAGE. — A telegraph company is responsible for its negligence to a person to whom a message is addressed, as well as to the sender.

TELEGRAPH COMPANY — NEGLIGENCE — LIABILITY FOR MENTAL SUFFERING. — In addition to nominal damages, a recovery may be had against a telegraph company for mental suffering resulting from its negligence in failing to deliver with diligence a message announcing the dangerous sickness of a relative, when the language employed in the message is reasonably sufficient to put the company on inquiry as to the relationship between such relative and the person addressed, and to apprise the company that the object of the message was to afford the receiver an opportunity to attend the relative in his last sickness, or to be present at the funeral in case of death.

TELEGRAPH COMPANY — NEGLIGENCE — LIABILITY FOR MENTAL SUFFERING. — The failure of a telegraph company to deliver a message worded "Come in haste; your wife is at the point of death," by which the person addressed was prevented from being present at his wife's death or attending her funeral, although his residence and place of business was in the same town, within a short distance of the office of the company where the message was received, and well known to it, is gross negligence, for which the receiver is entitled to maintain an action of tort; and in addition to nominal damages, to recover actual damages, including damages for mental suffering and anguish inflicted on him by such negligence.

ACTION against the telegraph company to recover for its negligence in failing to promptly deliver the following message delivered to the company, together with the sum charged for transmission, at Greenville, where plaintiff's wife was at the time visiting:—

"GREENVILLE, S. C., February 26, 1889.

"To J. T. YOUNG, New Berne, N. C.

"Come in haste; your wife is at the point of death.

"(Signed) J. W. RICE."

The complaint, in addition to these facts, alleged that the message was received by the company at New Berne on the next day, and, with ordinary diligence, could have been delivered to plaintiff in a few minutes after it was received, as his place of residence and business was, and for a long time prior thereto had been, well known to the company, being within four hundred yards of its office; that through the gross negligence of the company, the plaintiff had no notice of the message until seven days after its transmission, when, being notified by letter, he went to the company's office and received the message on demand; that during all this time, plaintiff was at his place of business; and that if the message had been delivered with reasonable promptness, he could have had the consolation of being with his wife in the moments of her last sickness, and of attending her funeral, all of which he was deprived of by the negligence of the company in failing to deliver the message, in consequence of which he has suffered great pain, mental anguish, and distress, and demands damages. A demurrer, interposed on the ground that the complaint did not state facts sufficient to constitute a cause of action, was overruled, and defendant excepted and appealed.

W. W. Clark, for the appellant.

C. Manly, F. M. Simmons, and O. H. Guion, for the respondent.

CLARK, J. In addition to the ground of demurrer set out in the record, the defendant demurred *ore tenus*, in this court, that the complaint did not state a sufficient cause of action, in that the plaintiff was not a party to the contract, and, therefore, could not maintain an action for its breach.

Upon the question whether the receiver can maintain the action, Shearman and Redfield on Negligence, section 560, says: "We think, therefore, upon the principle of these decisions, a telegraph company is responsible for its negligence to a person to whom a message is addressed, as well as to the sender. If it were not so, it is obvious that the receivers of telegrams would often receive great damage, without any means of redress." There is ample authority to the same effect: *Wadsworth* v. *Western Union Tel. Co.*, 86 Tenn. 695; 6 Am. St. Rep. 864; *Elwood* v. *Western Union Tel. Co.*, 45 N. Y. 549; 6 Am. Rep. 140; *Ellis* v. *Telegraph Co.*, 13 Allen, 227; *New York etc. Tel. Co.* v. *Dryburg*, 35 Pa. St. 298; 78 Am. Dec. 338; *Markel*

v. *Western Union Tel. Co.*, 19 Mo. App. 80, and many others. This, while not the English rule, is stated, by Gray on Telegraphs, sec. 65, 2 Thompson on Negligence, 847, 5 Lawson's Rights and Remedies, sec. 1972, and Wharton on Negligence, sec. 758, to be the invariable rule in this country. The following may be summed up as the reasons assigned therefor: 1. That a telegraph company is a public agency, and responsible, as such, to any one injured by its negligence, or, at least, it is the common agent of sender and receiver, and responsible to each for any injury sustained by them, respectively, by its negligence; 2. That in a case like this, the receiver is the beneficiary of the contract, and the injury, if any, caused by the company's negligence must be to him; 3. The message is the property of the party addressed, in analogy to a consignee of goods; 4. That upon the face of the message, such as this, the sender is the agent of the receiver, and the latter, as the principal, can maintain an action for breach of the contract, or for a tort, if injury is done him by negligence in performance of the duty contracted for. "The company's employment is of a public character, and it owes the duty of care and good faith to both sender and receiver": 3 Sutherland on Damages, 314. This author goes on to state that where there is gross or willful negligence, the action can be brought either for tort or on contract, and in case of misfeasance, the company is liable also to third parties as wrong-doers.

Upon authority and reason, we think it clear that the plaintiff could maintain the action, and whether it is an action *ex contractu* for breach of the contract of speedy and safe transmission, or *ex delicto* for negligence and violation of the duty which the defendant owed as a public corporation, or as common agent of sender and receiver, at least nominal damages could be recovered.

"The principle that for the violation of every legal right, nominal damages, at least, will be allowed applies to all actions, whether for tort or breach of contract, and whether the right is personal or relates to property": 1 Sutherland on Damages, 11. Where "there is a neglect of duty by a telegraph company, and an infraction of the plaintiff's right to have care and diligence used in the sending and delivery of his message, he is entitled to nominal damages at least": 1 Sutherland on Damages, 11.

The other question, and the one most earnestly pressed upon our consideration, is, whether the plaintiff can recover

for mental pain and anguish when there has been no physical injury.

In Shearman and Redfield on Negligence, section 605, it is said: "In case of delay or total failure of delivery of messages relating to matters not connected with business, such as personal or domestic matters, we do not think that the company in fault ought to escape with mere nominal damages on account of the want of strict commercial value in such messages. Delay in the announcement of a death, an arrival, the straying or recovery of a child, and the like, may often be productive of an injury to the feelings which cannot easily be estimated in money, but for which a jury should be at liberty to award fair damages. Yet, in such cases, the damages ought not to be enhanced by evidence of any circumstances which could not reasonably have been anticipated as probable from the language of the written message."

This paragraph was cited and approved by the court of appeals of Kentucky in an opinion filed on June 14, 1890 (*Chapman* v. *Western Union Tel. Co.*, 13 S. W. Rep. 880), in which the court says: "This seems to be the true rule, — one which is in accord with reason, and necessary to a proper protection of individual right and the interests of the public."

In this case, the court held that the plaintiff could recover damages for delay in the delivery of a message announcing the illness and death of the plaintiff's father, and says: "Many of the text-writers say that a person cannot recover damages for mental anguish alone, and that he can recover such damages only where he is entitled to recover some damages upon some other ground. It will generally be found, however, that they are speaking of cases of personal injury. If a telegraph company undertakes to send a message, and it fails to use ordinary diligence in doing so, it is certainly liable for some damage. It has violated its contract; and whenever a party does so, he is liable, at least to some extent. Every infraction of a legal right causes injury in contemplation of law. The party being entitled, in such a case, to recover something, why should not an injury to the feelings, which is often more injurious than a physical one, enter into the estimate? Why, being entitled to some damage by reason of the other party's wrongful act, should not the complaining party recover all the damage arising from it? It seems to us that no sound reason can be given to the contrary. The business of telegraphing, while yet in its infancy, is already of wonder-

ful extent and importance to the public. It is growing, and the end cannot yet be seen. A telegraph company is a *quasi* public agent, and, as such, it should exercise the extraordinary privileges accorded to it with diligence to the public. If in matters of mere trade it negligently fails to do its duty it is responsible for all the natural and proximate damage, is it to be said or held that, as to matters of far greater interest to a person, it shall not be, because feelings or affections only are involved? If it negligently fails to deliver a message which closes a trade for one hundred dollars, or even less, it is responsible for the damage. It is said, however, that if it is guilty of like fault as to a message to the husband that the wife is dying, or the father that his son is dead and will be buried at a certain time, there is no responsibility save that which is nominal. Such rule, at first blush, merits disapproval. It would sanction the company in wrong-doing. It would hold it responsible in matters of the least importance, and suffer it to violate its contracts with impunity as to the greater. It seems to us that both reason and public policy require that it should answer for all injury resulting from its negligence, whether it be to the feelings or the purse, subject only to the rule that it must be the direct and proximate consequence of the act. The injury to the feelings should be regarded as a part of the actual damage, and the jury be allowed to consider it. If it be said that it does not admit of accurate pecuniary measurement, equally so may it be said of any case where mental anguish enters into the estimate of injury for a wrong, and it furnishes no sufficient reason why an injured party should not be allowed to look to the wrong-doer for reparation. If injury to the feelings be an element to the actual damages in slander, libel, and breach of promise cases, it seems to us it should equally be so considered in cases of this character. If not, then most grievous wrongs may often be inflicted with impunity; legal insult added to outrage by the party, by offering one cent, or the cost of the telegram, as compensation to the injured party. Whether the injury be to the feelings, or pecuniary, the act of the violator of a right secured by contract has caused it. The source is the same, and the violator should answer for all the proximate damages."

In Indiana and Texas, opinions to the same effect have also been filed during the present year. In the Indiana case (*Reese v. Western Union Tel. Co.*, 123 Ind. 294), Berkshire, J., says:

"Although the telegram had no relation to any business transaction which would have involved dollars and cents merely, this did not justify the appellee in neglecting its duty. It had undertaken, for a valuable consideration, to deliver the message promptly, and its failure so to do, or to make reasonable effort in that direction, was negligence and a violation of its undertaking. The diligence which a telegraph company is required to use in the delivery of a message will be determined, to some extent, from the character and importance of the message. Upon humane grounds, messages like the one here involved should be promptly delivered, and should be regarded as of more importance to the parties concerned than mere business messages, and, in promptness of delivery, should have preference over messages of the latter class. From the information it had before it when it entered into the undertaking, the appellee was bound to know that mental anguish might, and most probably would, come to some person in case it failed to act promptly in transmitting and delivering the dispatch, and therefore such a result was contemplated when the message was delivered by the appellant to the appellee's agent at Jamestown, and is within the undertaking. The appellant having suffered great mental anguish, because, as he alleges, of the failure to promptly deliver the message, it would be a harsh rule which would deny to him all redress except the mere pittance which he paid to have the telegram transmitted and delivered. Some of the authorities seek to draw a distinction, as to the right to recover damages for mental suffering, between cases where there may be a recovery for pecuniary loss, and cases where there is, or can be, no pecuniary loss, to which class the present action belongs. With this distinction we have no sympathy, and confess we can see no good reason for it to rest upon. If a telegraph company undertakes to transmit and deliver promptly a message wherein dollars and cents are alone involved, and its negligence occasions loss, it is conceded by all the authorities that it may be compelled to respond in damages. Why? Because it has negligently broken its agreement, or as is sometimes said, failed to perform a duty which it owed to the sender of the message or the person to whom it is addressed, as the case may be. For the same pecuniary consideration it undertakes to transmit and deliver a message informing a husband of the dangerous illness of his wife, the wife of her husband, the parent of the child, the child of the

parent, and it negligently fails to deliver the telegram, and, as a result, the sick relation dies without having the comforting presence of a husband, wife, father, mother, son, or daughter, with all the benefit, physical and mental, which would follow. Is it to be said that, under such circumstance, the most that the telegraph company is liable for is nominal damages because of greater mental anguish suffered by the sender of the telegram, who may be the father, mother, husband, wife, or child? In our judgment, no such rule can or should prevail. In failing to promptly deliver the telegram, the telegraph company negligently fails to perform a duty which it owes to the sender of a telegram, and should be held liable for whatever injury follows as the proximate result of its negligent conduct. It is not a mere breach of contract, but a failure to perform a duty which rests upon it as a servant of the public. In our opinion, the appellant is entitled to recover damages for the mental suffering which he has endured, and his measure of damages is the amount paid for the transmission of the message, and, in addition, what would seem to be just as a compensation for his mental anguish."

In the other case (*Western Union Tel. Co.* v. *Moore*, 76 Tex. 66; 18 Am. St. Rep. 25), the court held that a message delivered for transmission to a telegraph company, containing the words, "Billy is very low; come at once," is sufficient to apprise the company that the message refers to a near relative of the person to whom it is addressed, and of the fact that mental suffering is likely to result from a failure to transmit the message with diligence and dispatch; and says: "In the case of *Western Union Tel. Co.* v. *Adams*, 75 Tex. 531, 16 Am. St. Rep. 920, it was held, in effect, that a recovery could be had for mental suffering resulting from a failure to deliver with diligence a telegraphic message announcing the sickness or death of a relative, provided the language employed in the message was reasonably sufficient to put the company upon inquiry as to the relationship between such person and the party addressed, and to apprise them that its object was to afford the party an opportunity to attend upon his relative in his last sickness, or to be present at the funeral in the case of death. The same prineiple was affirmed in the case of *Western Union Tel. Co.* v. *Feegles*, 75 Tex. 537," decided at the same term, and *Western Union Tel. Co.* v. *Broesche*, 72 Tex. 654; 13 Am. St. Rep. 843.

In *Western Union Tel. Co.* v. *Cooper*, 71 Tex. 507, 10 Am.

St. Rep. 772 (1888), Collard, J., says: "Appellant claims that its demurrers to plaintiff's petition should have been sustained, because injury to feelings, disconnected from all actual personal injury, are exemplary damages, and the facts alleged are not sufficient to recover exemplary damages. The very question raised here was before the supreme court in the case of *Stuart* v. *Western Union Tel. Co.*, 66 Tex. 580; 59 Am. Rep. 623; and the court, after discussing the So Relle case (*So Relle* v. *Western Union Tel. Co.*, 55 Tex. 310; 40 Am. Rep. 805), and the two Levy cases (*Galveston etc. R'y Co.* v. *Levy*, 59 Tex. 543; 46 Am. Rep. 278; *Galveston etc. R'y Co.* v. *Levy*, 59 Tex. 563), the case of *Hays* v. *Houston etc. R. R. Co.*, 46 Tex. 272, and other authorities, uses the following language: 'But it is claimed that the mental is an incident to the bodily pain, and that without the latter the former cannot be considered as actual damages. In cases of bodily injury, the mental suffering is not more directly and naturally the result of the wrongful act than in this case, — not more obviously the consequences of the wrong done than in this case. What difference exists to make the claimed distinction? That it is caused by and contemplated in doing the wrongful act is the principle of liability. The wrong-doer knows that he is doing this damage when he afflicts the mind by withholding the message of mortal illness as well as by a wound to the person.' The conclusion derived from the opinion in the case from which the foregoing extract is taken is, that injury to feelings, caused by a failure to deliver a message relating to domestic affairs, where the failure is the result of negligence on the part of the company or its servants, is an element of actual damage. The same principle was decided by the commission of appeals in the case of *Miller* v. *Gulf etc. R'y Co.*, erroneously styled in the reports *Wilson* v. *Gulf etc. R'y Co.*, 69 Tex. 739, and it was held that the right to recover would not depend upon the degree of negligence causing the injury. If the inexcusable negligence of the defendant's servants is found to be the proximate cause of the injury, damages may be recovered, commensurate with the injury."

In *Western Union Tel. Co.* v. *Simpson*, 73 Tex. 422 (decided 1889), the court reaffirmed the same doctrine as does *Loper* v. *Western Union Tel. Co.*, 70 Tex. 689, which is exactly like our case, except that the relationship was that of a mother who was prevented from being at her son's death-bed and burial by negligent delay in the delivery of the telegram.

In a recent case (1888), decided in the supreme court of Tennessee (*Wadsworth* v. *Western Union Tel. Co.*, 86 Tenn. 695; 6 Am. St. Rep. 864), that court affirms the same doctrine; and Caldwell, J., after quoting the authorities to the effect that damages for mental anguish cannot usually be given in an action for breach of contract, says: "These are but illustrations and applications of the general rule, which we have already stated, for the estimation of damages in actions for breach of contract. They serve the purpose of showing that in the ordinary contract only pecuniary benefits are contemplated by the contracting parties, and that therefore the damages resulting from the breach of such a contract must be measured by pecuniary standards; and that where other than pecuniary benefits are contracted for, other than pecuniary standards will be applied in the ascertainment of the damages flowing from the breach. The case before us (so far as it is an action for breach of contract) is subject to the same general rule, and the defendant is answerable in damages for the breach, according to the nature of the contract, and the character and extent of the injury suffered by reason of its non-performance. The messages were sent for a particular purpose, which was disclosed upon their face, and of which the defendant had full notice. That purpose was not of a pecuniary nature. There was no offer or instruction to buy or sell anything,—no proposition or promise with respect to any business transaction. The messages were of far greater importance to the receiver than any of these. Her brother was lying at the point of death, in easy reach of her. It was information of this fact that the defendant first undertook to convey to her for a stipulated sum, and which, if conveyed promptly, would have enabled her to be with him in his last moments, and would have saved her the injury of which she complains. Then her brother died away from her; his body needed her attention, and would have received it, as averred, if the defendant had done its duty. It was intelligence of the death which the defendant agreed, in the second place, to communicate to her. The messages were proper in language, and lawful in purpose. She was entitled to the information they contained, and to whatever benefits that information would have conferred upon her, even though such benefits be mainly or altogether to the feelings and affections. The defendant contracted that she should have those benefits, and that she should be spared whatever pain and anguish such in-

formation, promptly conveyed, would prevent. By all the authorities, including our code, it was the duty of the defendant to transmit and deliver these messages 'correctly and without unreasonable delay,' and in failing to do so it became responsible for all loss or injury occasioned thereby: Code (Mill. & V.), secs. 1541, 1542; *Marr* v. *Western Union Tel. Co.*, 85 Tenn. 529; Gray on Telegraphs, secs. 81, 82, et seq.; Cooley on Torts, 646, 647; Wharton on Negligence, sec. 767; 3 Sutherland on Damages, 298–300; Shearman and Redfield on Negligence, sec. 605. This rule of damages is enforced by the supreme courts of Georgia, Virginia, and other states, even where the message is in cipher: *Western Union Tel. Co.* v. *Fatman*, 73 Ga. 285; 54 Am. Rep. 877; *Western Union Tel. Co.* v. *Reynolds*, 77 Va. 173; 46 Am. Rep. 715, and reporter's note at end of case. It is true that most of the adjudged cases in which telegraph companies have been required to respond in damages for their negligence have involved questions of pecuniary loss, but we cannot agree that for that reason the liability should attach and be enforced in such cases only. Telegraphy is of comparatively recent origin, and the law concerning the duties and liabilities of telegraph companies has hardly passed its infancy, and cannot be expected, at so early a day in its history, to be settled, even in its important parts, by a long line of concurrent decisions.

"In addition to this, it is but reasonable to presume that such a flagrant breach of plain obligation, with respect to matters so near the heart and so accustomed to the respect of all mankind as is here averred, has but seldom occurred, and therefore has but seldom been brought to the attention of the courts of the country. To hold that the defendant is not liable in this case for the wrong and injury done to the feelings and affections of Mrs. Wadsworth by its default would be to disregard the purpose of the telegrams altogether, and to violate that rule of law which authorizes a recovery of damages appropriate to the objects of the contract broken; and furthermore, such a holding would justify the conclusion that the defendant might with impunity have refused to receive and transmit such messages at all; and that it has the right in the future to do as it has done in this case, or at least, that it cannot be required to respond in damages for doing so. To such a result we think no court should submit. The telegraph company is the servant rather than the master of its patrons. That the amount of damages

allowable in such a case as this is not capable of easy and accurate mathematical computation is freely conceded; but that should not be a sufficient reason for refusing or defeating the right of action altogether; for the same objection may be urged with the same force in all cases where mental and bodily suffering are treated as proper elements of damage. It is very appropriately said, however, in the conclusion of the opinion in So Relle's case, that 'great caution should be observed in the trial of cases like this, as it will be so easy and natural to confound the corroding grief occasioned by the loss of the parent or other relative with the disappointment and regret occasioned by the fault or neglect of the company; for it is only the latter for which a recovery may be had, and the attention of juries might well be called to that fact.' Nor do we think the suggestion that the decision we are making may encourage the bringing of other suits of a similar nature is of very great moment as a matter for the consideration of the court in its endeavor to reach a just and sound conclusion. It is rather to be hoped that instances of such dereliction of plain, easy, and important duty have not been very numerous in the past, and that they will seldom transpire in the future."

In the United States circuit court, in the case of *Beasley* v. *Western Union Tel. Co.*, 39 Fed. Rep. 181 (decided 1889), the court held that if by cause of the unreasonable delay of a telegram the husband was prevented from reaching his wife's bed before her death, he could recover a proper compensation for his disappointment and mental anguish. The judge (Maxey) very properly adds that caution should be observed by the jury to distinguish between the pain caused the plaintiff by the wife's death, for which the defendant was not responsible, and that caused by being deprived, by defendant's negligence, of the consolation of seeing his wife before her death.

This subject is one of the first impression in this state.

It is a matter of importance to the public that it should be settled what legal obligation, if any, rests upon the telegraph companies to deliver promptly messages of a social nature, not concerning pecuniary transactions. To many, and in many instances, they are far more important. If no pecuniary damages can be recovered for a breach of the duty to deliver such messages, beyond the recovery of the petty sum paid for transmission, the usefulness and value to the public of such corporations will be materially diminished. We have

therefore cited quite fully from the most recent cases on the subject. There are older cases sustaining the same doctrine.

In *So Relle* v. *Western Union Tel. Co.*, 55 Tex. 308, 40 Am. Rep. 805, it was held that a telegraph company is liable for injury to the feelings of a son from delay in delivering to him a message announcing the death of his mother, whereby he was prevented from attending her funeral.

In *Stuart* v. *Western Union Tel. Co.*, 66 Tex. 580, 59 Am. Rep. 623, it is held that where, by gross negligence in delivering a telegram, plaintiff was prevented from seeing his brother in his last illness and attending his funeral, compensation for injury to feelings may be recovered. The same principle is intimated in *Logan* v. *Western Union Tel. Co.*, 84 Ill. 468, and there are other authorities. There are some authorities to be found of a contrary tenor: *West* v. *Western Union Tel. Co.*, 39 Kan. 93; 7 Am. St. Rep. 530; *Russell* v. *Western Union Tel. Co.*, 3 Dak. 315; and some others; but they fail to satisfy us that they are consonant to justice and the "reason of the thing."

Damages for injury to the feelings, such as mental anguish or humiliation, are given, though there may be no physical injury, in many cases. They are allowed where a party is wrongfully put off a train: 8 Sutherland on Damages, 259; in actions for breach of promise of marriage; in actions for slander and libel: *Terwilliger* v. *Wends*, 17 N. Y. 54; 72 Am. Dec. 420; in actions for malicious arrest and prosecution; *Fisher* v. *Hamilton*, 49 Ind. 341; in actions for false imprisonment: *Stewart* v. *Maddox*, 63 Ind. 51; for illegally suing out an attachment: *Byrne* v. *Gardner*, 33 La. Ann. 6; for *crim. con.* and for seduction; and in other cases. Damages for injured feelings were also allowed where a conductor kissed a female passenger against her will: *Craker* v. *Chicago etc. R'y Co.*, 36 Wis. 657; 17 Am. Rep. 504. In actions by a father for seduction of a daughter, by a fiction of law the damage is laid *per quod servitium amisit*, but the recovery is generally out of all proportion to any possible valuation of the services; and it is well understood that in fact compensation is not given for them, but for the wounded and outraged feelings of the parent. We see, therefore, no reason why the doctrine of compensation for injury to feelings should not embrace a case like the one before us.

When a passenger, while traveling on the cars, is injured by a collision or other negligence, though there is a breach of

the contract of safe carriage, yet the plaintiff can elect to hold the carrier liable in tort for the negligence which caused the injury: *Wood* v. *Milwaukee etc. R'y Co.*, 32 Wis. 398; *Craker* v. *Chicago etc. R'y Co.*, 36 Wis. 657–675; 17 Am. Rep. 504, and cases cited.

By analogy, when there is an injury caused by negligence and delay in the delivery of a telegram, the party injured is entitled to sue in tort for the wrong done him. In *Stuart* v. *Western Union Tel. Co.*, 66 Tex. 580, 59 Am. Rep. 623, it is said: "We have no forms of action or technical rules which can prevent a plaintiff, upon a statement of the facts of his case, from recovering all the damages shown to be sustained. If the facts stated show a breach of contract, and also that the breach is of such a character as to authorize an action of tort, all the damages for the thing done or omitted, either *ex contractu* or *ex delicto*, may be recovered in the one action." To the same effect, *Galveston etc. R'y Co.* v. *Levy*, 59 Tex. 547; 46 Am. Rep. 269; and *Wadsworth* v. *Western Union Tel. Co.*, 86 Tenn. 695; 6 Am. St. Rep. 864.

It seems to us that this action is in reality in the nature of tort for the negligence, and that, as is usually the case in such actions, the plaintiff is entitled to recover, in addition to nominal damages, compensation for the actual damages done him, and that mental anguish is actual damage.

It is very truthfully and appropriately remarked by a learned author that "the mind is no less a part of the person than the body, and the sufferings of the former are sometimes more acute and lasting than those of the latter. Indeed, the sufferings of each frequently, if not usually, act reciprocally on the other": 3 Sutherland on Damages, 260. And Cicero (who certainly may be quoted as an authority among lawyers) says, in his Eleventh Philippic against Anthony, "Nam quo major vis est animi quam corporis, hoc sunt graviora ea quæ concipiuntur animo quam illa quæ corpore." "For as the power of the mind is greater than that of the body, in the same way the sufferings of the mind are more severe than the pains of the body."

The difficulty of measuring damages to the feelings is very great, but the admeasurement is submitted to the jury in many other instances, as above stated; and it is better it should be left to them, under the wise supervision of the presiding judge, with his power to set aside excessive verdicts, than, on account of such difficulty, to require parties injured in their feelings

by the negligence, the malice, or wantonness of others, to go without remedy.

Scott and Jarnagin on Telegraphs, section 418, says that damages for gross negligence in the delay of a telegram, whereby the feelings of the parties are outraged, are vindictive or exemplary, and largely in the discretion of the jury; that they are given rather to punish the offender than to recompense the party injured, and some of the authorities above referred to support that view. Our own opinion, however (certainly when no malice is alleged), is, that they are awarded as compensation to the plaintiff for the wrong he has sustained in the mental anguish needlessly inflicted on him by the negligence of the defendant: Sedgwick on Damages, 35.

The demurrer was properly overruled.

THE CASE OF *Thompson* v. *Western Union Tel. Co.*, 107 N. C. 449, was an action against the defendant company to recover damages caused by its negligence in failing to deliver promptly a telegraphic message. The facts of the case were, that plaintiff's wife was about to be confined, in Danville, Virginia, and her son, by her direction, delivered a telegram to an agent of the defendant company at that place, directed to the plaintiff at Milton, North Carolina, paid for, and worded: "Father, come at once; mother is sick." The message was not delivered until the next day, and until after a delay of twenty-four hours after it was received. The plaintiff complained that by reason of such delay the child had been born dead, before his arrival; that his wife had suffered greater pain, physically and mentally, than she would have done had he reached her in time, which he would have done but for the delay in the delivery of the telegram; and that in addition to such pain, and for lack of his presence and services, and by reason thereof, caused by the delay in the delivery of the message, she suffered a premature delivery and incurred a permanent and incurable physical injury therefrom, for all of which the plaintiff prayed damages. The court held, upon this state of facts, that the delay in delivering the telegram, unexplained, made a case of gross negligence against the company; that the grounds upon which the prayer for damages was based were none of them so remote as to bar a recovery of damages; that the stipulation in the telegraphic blank against liability for unrepeated messages did not protect the company in case of such delay, and only applied in cases of mistakes in transmission; and approving *Young* v. *Western Union Tel. Co.*, above reported, that mental suffering caused by such negligence and delay in the delivery of the telegram was a ground for the recovery of damages, though no physical pain or pecuniary loss was suffered.

TELEGRAPH COMPANY — NEGLIGENCE — LIABILITY TO RECEIVER OF MESSAGE. — Where a telegraph company negligently failed to deliver a telegram sent for the benefit of the receiver, the latter may maintain an action for damages: *Wadsworth* v. *Western Union Tel. Co.*, 86 Tenn. 695; 6 Am. St. Rep. 864, and note. An action may be maintained by the sendee, as well as the sender, for damages for failure to deliver message: *Western Union Tel. Co.* v. *Allen*, 66 Miss. 549.

TELEGRAPH COMPANY — NEGLIGENCE — LIABILITY FOR MENTAL ANGUISH. — Mental anguish is an element for which damages may be recovered for delay or failure to deliver a message, when the face of the dispatch suggests the necessity for prompt delivery: *Western Union Tel. Co.* v. *Henderson*, 89 Ala. 510; 18 Am. St. Rep. 148, and note; *Western Union Tel. Co.* v. *Broesche*, 72 Tex. 654; 13 Am. St. Rep. 843, and note; *Loper* v. *Western Union Tel. Co.*, 70 Tex. 689; *Reese* v. *Western Union Tel. Co.*, 123 Ind. 294.

WOODWARD *v.* BLUE.

[107 NORTH CAROLINA, 407.]

PARENT AND CHILD — LEGITIMACY, HOW ESTABLISHED. — The question of the legitimacy or illegitimacy of the child of a married woman is one of fact, resting on decided proof as to the non-access of the husband, and the facts must generally be left to the jury to determine. Opportunity of access by the husband, however, is not conclusive evidence of legitimacy.

PARENT AND CHILD — LEGITIMACY — EVIDENCE. — Where, on the issue as to the legitimacy of a child, the evidence tends to prove non-access by the negro husband, and that the wife, a mulatto woman, for three years before the birth of such child continuously lived in adultery with a white man; that the child, by its color, must have been the child of a white man; and that the mother had declared that it was not the child of her negro husband, who was not allowed to come to the house where she lived, — the question of non-access by the husband is for the jury to determine, and the treatment of the child by the white paramour of the wife is competent evidence to corroborate the evidence of non-access.

ACTION involving the issue of the legitimacy of a child. The evidence, which the court refused to admit, and from which ruling an appeal is taken, is stated in the opinion.

J. T. Perkins and John Devereux, Jr., for the appellants.

S. J. Ervin, for the respondent.

CLARK, J. The maxim, *Pater est quem nuptiæ demonstrant*, was formerly so strictly construed that from the time of the Year-Books down to the last century a child born of a married woman was conclusively presumed legitimate, unless the husband was shown to be impotent, or not *infra quatior maria*. The ancient rule, with the homely illustration given by Judge Rickhill in Flettsham and Julian (Year-Book, 7 Hen. IV., c. 9, sec. 18), is familiar to us by the great dramatist having placed it in the mouth of King John (act 1, scene 1): *Van Aernam* v. *Van Aernam*, 1 Barb. Ch. 375. But the rule was much modified in *Pendrell* v. *Pendrell*, Strange, 925, and the Banbury Peerage case in the house of lords, 1 Sim. & S. 153, and succeeding cases, until now it is best stated by Chan-

cellor Kent (2 Com. 210), as follows: "The question of the legitimacy or illegitimacy of the child of a married woman is one of fact, resting on decided proof as to the non-access of the husband, and the facts must generally be left to the jury for determination": Schouler on Domestic Relations, sec. 225; *Hargrave* v. *Hargrave*, 9 Beav. 552, opinion by Lord Langdale. In *Cope* v. *Cope*, 5 Car. & P. 604, it is said: "If a husband have access, and others at the same time are carrying on a criminal intimacy with his wife, a child born under such circumstances is legitimate in the eye of the law. But if the husband and wife are living separate, and the wife is notoriously living in open adultery, although the husband have an opportunity of access, it would be monstrous to suppose that, under these circumstances, he would avail himself of such opportunity. The legitimacy of a child born under such circumstances could not therefore be established."

The evidence of the mother in the present case was, that "while in Tennessee, she and Underzine lived in one of the cabins on Greenlea's place; that they were in Tennessee six years, and the plaintiff Emily was born four years after they moved to Tennessee." It may be noted that she does not testify that Emily was the child of Underzine. As the defendants claim under Underzine, it may be a question under the code (sec. 590), if the mother, who is a party plaintiff, was a competent witness to show the alleged marriage or the living together of herself and Underzine; but the point is not raised by any exception, and we pass it by. The testimony offered by defendants was, that for two or three years, continuously, before Emily was born, the mother lived at the residence of Greenlea, the master, and Underzine and she did not live together for three years prior to Emily's birth, during which time there was no friendly intercourse between them, and Underzine was not allowed at the house where the mother and Greenlea stayed; that the child favored Greenlea, and, by its color, was the child of a white man; that the mother told Underzine the child was not his, and he would not have it to support; that Greenlea was an unmarried man, without family. There was evidence on the part of the plaintiffs that Underzine had declared Emily to be his child, and much evidence on the part of defendants that he had repeatedly declared that she was not his child. The defendants then offered to show by a witness, a former slave of Greenlea, who lived on the farm in Tennessee at the time of Emily's birth,

how Greenlea treated Emily, with a view of showing that he was her father. The court excluded the question, and the defendant excepted. Had Greenlea been a defendant in a bastardy proceeding or in an indictment for fornication and adultery, this evidence would, in view of the other matters in evidence, have been competent. We can see no reason why it should not also have been valuable aid to the jury in arriving at a just conclusion in a proceeding to test the legitimacy of the child. There being evidence tending to show non-access by the husband, the jury should not have been cut off from a knowledge of how Greenlea treated the child. It may be that it could have been shown that he betrayed fondness and affection for it, showed anxiety in its illness, lavished money on it, or educated it; and surely these things would be strongly corroborative of the evidence of the defendant, for it would be hardly expected that a white man should so act towards the child of Underzine, his negro slave. Was not the violent grief of David, the king, upon the death of the child, some corroboration that he, and not Uriah, was its father? In the nature of the case, the paternity of a child can hardly be said to be subject to direct proof. Therefore, when it is born in wedlock, the law presumes its legitimacy from that circumstance. This presumption can only be rebutted by circumstances; and what more potent could there be than the conduct of the wife in living separate from the husband, with a paramour, and the latter's treatment of the offspring?

For, though there was opportunity of access by the husband, it is not conclusive of legitimacy: *Cope* v. *Cope*, 5 Car. & P. 604.

In *Morris* v. *Davies*, 5 Clark & F. 163, the house of lords, on an issue like this, gave weight to the conduct of the paramour towards the child. This also was done in *Cannon* v. *Cannon*, 7 Humph. 410; 1 Bishop on Marriage and Divorce, sec. 448. Such testimony is in the nature of natural evidence, and stronger than a mere declaration of paternity by the paramour.

It should appear what the party offering excluded testimony expected to prove by it: *State* v. *Williford*, 91 N. C. 529; but here the question is sufficiently explicit, in that it was asked to show the treatment of Emily by Greenlea, and the bearing of the evidence is sufficiently indicated by the question, and the statement that it was offered as testimony to show that Greenlea was the father.

When this case was here before (*Woodward* v. *Blue*, 103 N. C. 109), the court, Smith, C. J., delivering the opinion, pointed out that the so-called marriage of Underzine and the mother, the former being a slave and the latter a free person (the child of a white mother and a slave father), was utterly invalid till the act of 1879 (Code, sec. 1281, canon 13), and that "to repel the inference of paternity, drawn from the mere fact of cohabitation (by that act), the same stringent rules do not prevail as in cases of established legal marriage," for the application of that statute is made to depend upon "cohabitation subsisting at the birth of the child, and the paternity of the party from whom the property claimed is derived. The cohabiting alone does not confer legitimacy, though it furnishes presumptive evidence," which is open to disproof.

A fortiori there was error in rejecting the testimony offered.

Error.

PARENT AND CHILD — LEGITIMACY — HOW ESTABLISHED. — Every child is presumed to have been born in lawful wedlock, and this presumption must prevail until overcome by clear and convincing proof: *Orthwein* v. *Thomas*, 127 Ill. 554; 11 Am. St. Rep. 159, and note. And it is the duty of the jury to weigh the evidence against this presumption, and decide according to the preponderance: *Wright* v. *Hicks*, 15 Ga. 160; 60 Am. Dec. 687, and note.

The evidence of non-access of the husband must be clear and positive: *Scott* v. *Hillenberg*, 85 Va. 245. In a bastardy suit, the burden of proof is upon the complainant to establish the paternity of the child: *Overlach* v. *Hall*, 81 Me. 348.

BRISTOL *v.* PEARSON.

[107 NORTH CAROLINA, 562.]

SALES — VENDOR'S LIEN FOR PURCHASE-MONEY — WAIVER. — A vendor's lien for the purchase price of personal property is not waived, in the absence of an express agreement to that effect, by the taking of a note or other personal security of the vendee for the unpaid purchase-money. An intention to waive such lien in this way must, if it exists, be stated in the complaint.

S. J. Ervin, for the appellant.

J. B. Batchelor, *J. T. Perkins*, *and John Devereux, Jr.*, for the respondent.

SHEPHERD, J. Brem and McDowell sold a certain shaping-machine to Robertson, and under the terms of the contract of

sale (which was registered), the title was to remain in the former until the latter had paid the purchase-money.

The sum of $58.33 was paid in cash, and afterwards two simple promissory notes were given by the vendee for the balance of the purchase-money. Thereupon the vendors executed the following receipt: —

"Received of J. W. Robertson $175, in full payment of shaping-machine and bits, payments made as follows: $58.33 cash, and two notes of $58,33, payable August 17, 1889, and the other in ninety days from date.

"This June 17, 1889."

The notes were absolute promises to pay, but recited that they were given in part payment of the said machine. The last note has never been paid. The question presented is, whether the taking of the notes and the execution of the receipt had the effect of an actual payment, so as to vest the legal title to the machine in the vendee, and thus deprive the vendors of their lien. The referee does not find that such was the intention of the parties, but he concludes, as a matter of law, from the facts, which we have substantially stated, that the title passed and the lien was discharged.

"It may now be regarded as a well-settled rule that wherever the vendor's lien is recognized at all, it is not waived, in the absence of an express agreement to that effect, by the taking of the note or other personal security of the vendee for the purchase-money": *Winter* v. *Anson*, 3 Russ. 488; *Ex parte Peake*, 1 Madd. 346; *Selby* v. *Stanley*, 4 Minn. 65; *Garson* v. *Green*, 1 Johns. Ch. 308; *Denny* v. *Steakly*, 2 Heisk. 156.

"The intention to take a bill (that is, the mere personal obligation of the vendee) in absolute payment for goods sold must be clearly shown, and not deduced from ambiguous expressions, such as that the bill was taken 'in payment' for the goods, or 'in discharge of the price'": 2 Benjamin on Sales, 714.

"The presumption of law is against such satisfaction": *Hyman* v. *Devereux*, 63 N. C. 626.

In the leading case of *Teed* v. *Carruthers*, 21 Eng. Ch. 30, the mortgagee, after a cash payment of a part of the debt, gave a receipt to the mortgagor for two accepted bills of exchange, "in full of principal and interest due" upon a mortgage for ten thousand pounds. It was held that, "as between the mortgagee, the mortgagor, and the latter's assignees, by

deed and in bankruptcy," there was no payment, and the court made a decree of foreclosure.

The foregoing authorities, and especially the case last cited (which seems directly in point), effectually dispose of this appeal in favor of the vendor. If a purchaser, for value and for a present consideration, had been misled by the receipt, the result would be different.

In the absence of evidence, and a finding that the transaction was intended as a discharge of the lien, we must hold, in accordance with the general weight of authority, that there was error in the ruling below.

It is further to be observed that, in cases like this, the intention to discharge, etc., must, it seems, be alleged in the pleadings: 2 Jones on Liens, 1009; *Hyman* v. *Devereux*, 63 N. C. 626.

Error.

SALES — VENDOR'S LIEN FOR PURCHASE-MONEY — WAIVER. — Unless credit in a sale is expressly given, which is a waiver of any right to demand immediate payment, the vendor's lien continues to exist: *Southwestern etc. Co.* v. *Stanard*, 44 Mo. 71; 100 Am. Dec. 255, and note.

DEANS *v.* WILMINGTON AND WELDON R. R. Co.

[107 NORTH CAROLINA, 686.]

CONTRIBUTORY NEGLIGENCE, WHEN DOES NOT BAR RECOVERY. — When, at the time an injury is inflicted, it might have been avoided by reasonable care and prudence on the part of the defendant, an action will lie for damages, notwithstanding the previous negligence of the plaintiff.

NEGLIGENCE — PRESUMPTION. — RAILROAD ENGINEER who sees a human being walking along or across the track in front of his engine has a right to presume, without further information, that he is a reasonable person, and will get out of the way of harm before the engine reaches him; consequently, it is not negligence in the engineer to act on such presumption.

RAILROADS — DUTY OF ENGINEER. — It is the duty of a railroad engineer while running his engine to keep a careful lookout along the track in order to avert danger, in case he shall discover any obstruction in front of him, whether at a crossing or elsewhere.

RAILROADS — DUTY OF ENGINEER. — When an engineer discovers, or by reasonable watchfulness may discover, a person lying upon the track asleep or drunk, or sees a human being known by him to be insane, or otherwise insensible to danger, or unable to avoid it, upon the track in front, it is his duty to resolve all doubt in favor of the preservation of life, and immediately use every available means, short of imperiling the lives of passengers on his train, to stop it.

NEGLIGENCE, WHEN QUESTION FOR JURY. — In an action against a railroad to recover for personal injury, when it appears that a person, standing

on the track at the time that the engine passed going at the rate of twenty miles an hour, could see the party injured three fourths of a mile in front, lying in an apparently helpless condition across the track, it is a question for the jury to determine whether or not the engineer, in the exercise of due diligence, might have discovered, from his elevated position on the engine, the fact that such party was lying helpless across the rails, and by prompt and strenuous effort have saved his life by stopping the train, without imperiling the passengers. In such case, it is also for the jury to determine, with or without the aid of expert testimony, within what distance the train might have been stopped without putting the passengers in jeopardy.

NEGLIGENCE, WHEN QUESTION FOR JURY. — When the facts are undisputed, and two reasonable and fair-minded persons might draw inferences from them so different that, according to the conclusion of fact reached by one there would be negligence, while that deduced by another would show the exercise of ordinary care, the issue should be submitted to the jury for determination.

ACTION to recover for personal injury caused by the alleged negligence of the defendant company, and resulting in killing plaintiff's intestate. Plaintiff submitted to a judgment of nonsuit, and appealed. The material facts are stated in the opinion.

C. B. Aycock, for the appellant.

W. R. Allen and Isaac F. Dortch, for the respondent.

AVERY, J. When this court, in the case of *Gunter* v. *Wicker*, 85 N. C. 312, adopted the rule laid down in *Davies* v. *Mann*, 10 Mees. & W. 545, that "notwithstanding the previous negligence of the plaintiff, if, at the time when the injury was committed, it might have been avoided by the exercise of reasonable care and prudence on the part of the defendant, an action will lie for damages," it was thenceforth aligned with one of two classes holding widely divergent views as to the effect of contributory negligence on the part of a plaintiff, under certain circumstances, upon his right of recovery. That ruling has been expressly approved in a large number of later cases, and is now firmly grounded as a part of our system, in so far as it is distinct from that of any other courts where the common law of England prevails: *Farmer* v. *Wilmington etc. R. R. Co.*, 88 N. C. 564; *Turrentine* v. *Richmond etc. R. R. Co.*, 92 N. C. 638; *Aycock* v. *Raleigh etc. R. R. Co.*, 89 N. C. 321; *Troy* v. *Cape Fear etc. R. R. Co.*, 99 N. C. 298; 6 Am. St. Rep. 521; *McAdoo* v. *Richmond etc. R. R. Co.*, 105 N. C. 140; *Daily* v. *Richmond etc. R. R. Co.*, 106 N. C. 301; *Lay* v. *Richmond etc. R. R. Co.*, 106 N. C. 404; *Bullock* v. *Wilmington etc. R. R. Co.*, 105 N. C. 180; *Carlton* v. *Wilmington etc. R. R. Co.*,

104 N. C. 365; *Wilson* v. *Norfolk etc. R. R. Co.*, 90 N. C. 69. See also *Weymire* v. *Wolfe*, 52 Iowa, 533; *Chicago etc. R. R. Co.* v. *Kellam*, 92 Ill. 245; 34 Am. Rep. 130; *Meeks* v. *Southern Pac. R'y Co.*, 56 Cal. 513; 38 Am. Rep. 67; *Kenyon* v. *New York etc. R. R. Co.*, 5 Hun, 479.

In those states where the very opposite view was taken, it was held that where one went upon the track of a railroad company at a point other than a crossing where the public have a right of way, without special license, he was a trespasser, and could not recover for any injury inflicted upon him through the negligence of such company's agents or employees, unless it was wanton: *Mulherrin* v. *Delaware etc. R. R. Co.*, 81 Pa. St. 366; *Rounds* v. *Delaware etc. R. R. Co.*, 64 N. Y. 129; 21 Am. Rep. 597; *Pennsylvania Co.* v. *Sinclair*, 62 Ind. 301; 30 Am. Rep. 185; *Donaldson* v. *Milwaukee etc. R'y Co.*, 21 Minn. 293; Beach on Contributory Negligence; *New Jersey Express Co.* v. *Nichols*, 33 N. J. L. 434; 97 Am. Dec. 722.

In delivering the opinion in *Manly* v. *Wilmington etc. R. R. Co.*, 74 N. C. 655, Justice Bynum foreshadowed, by an intimation, the subsequent adoption by this court, in *Gunter* v. *Wicker*, 85 N. C. 312, of the principle stated in *Davies* v. *Mann*, 10 Mees. & W. 545; and after it had been approved in so many well-considered opinions, it became apparent that it would be illogical and inconsistent to adhere to the rule laid down in *Herring* v. *Wilmington etc. R. R. Co.*, 10 Ired. 402, 51 Am. Dec. 395, or the interpretation generally given to Judge Pearson's language by the leading text-writers of this country. In that case, the engineer might have seen two little negroes who were lying on the track asleep, according to conflicting testimony, from two hundred yards to a half-mile, before his engine reached them. He did not actually discover that the children were asleep till he was within twenty-five or thirty yards of them. The testimony showed, also, that the train could have been stopped by the engineer within from seventy-five to one hundred yards. The judge below charged the jury that the railroad company was not liable for the neglect of the engineer to keep a lookout along the track, except when he was approaching a crossing of a public road over the railway, and was not responsible for his failure to use the appliances at his command to stop the train until he actually saw the children asleep on the track, at a distance of twenty-five or thirty yards. This instruction was sustained by the court in the face of the fact that the counsel for the

plaintiff cited and relied upon *Davies* v. *Mann*, 10 Mees. & W. 545. The court failed even to advert to the doctrine laid down in that case.

It must, therefore, have been the settled purpose of this court, when the doctrine of *Davies* v. *Mann*, 10 Mees. & W. 312, was approved, to modify this rule whenever the point should be plainly presented, and that contingency has never arisen until the present time. We have reiterated the principle that where an engineer sees a human being walking along or across the track in front of his engine, he has a right to assume, without further information, that he is a reasonable person, and will step out of the way of harm before the engine reaches him: *McAdoo* v. *Richmond etc. R. R. Co.*, 105 N. C. 153; *Daily* v. *Richmond etc. R. R. Co.*, 106 N. C. 301; *Parker* v. *Wilmington etc. R. R. Co.*, 86 N. C. 221. It is not negligence in an engineer to act, in the absence of specific information, on the presumption that a man who is apparently awake, and is moving, is in full possession of all of his senses and faculties.

But it has been repeatedly held by this court that it is the duty of an engineer while running an engine, to keep a careful lookout along the track, in order to avoid or avert danger, in case he shall discover any obstruction in his front, whether at a crossing or elsewhere: *Bullock* v. *Wilmington etc. R. R. Co.*, 105 N. C. 180; *Carlton* v. *Wilmington etc. R. R. Co.*, 104 N. C. 365; *Wilson* v. *Norfolk etc. R. R. Co.*, 90 N. C. 69.

If the engineer discover, or by reasonable watchfulness may discover, a person lying upon the track asleep or drunk, or see a human being who is known by him to be insane, or otherwise insensible to danger, or unable to avoid it, upon the track in his front, it is his duty to resolve all doubts in favor of the preservation of life, and immediately use every available means short of imperiling the lives of passengers on his train, to stop it: *Lake Shore etc. R. R. Co.* v. *Miller*, 25 Mich. 279; *Railroad* v. *St. John*, 5 Sneed, 504; *Houston etc. R. R. Co.* v. *Smith*, 52 Tex. 178; *Isbell* v. *New York etc. R. R. Co.*, 27 Conn. 393; 71 Am. Dec. 78; *Meeks* v. *Southern Pac. R. R. Co.*, 56 Cal. 513; 38 Am. Rep. 67. For similar reasons we have held that the test of negligence where live-stock is killed or injured by a train is involved in the question whether the engineer, by keeping a proper lookout, could have discovered the animal in time to have prevented the injury: *Carlton* v. *Wilmington etc. R. R. Co.*, 104 N. C. 365; *Wilson* v. *Norfolk etc. R. R. Co.*, 90 N. C. 69. In *Bullock* v. *Wilmington etc. R. R. Co.*, 105 N. C. 180, the same

criterion was applied where it was alleged that an engineer might have discovered that a wagon was stalled at a crossing in time to prevent injury by stopping his train.

The pertinent portions of the testimony in the case before us may be gathered and grouped as follows, bearing in mind always that if, in the most favorable aspect for the plaintiff, there was a question raised that it was the exclusive province of the jury to determine, then there was error. A witness on the roadside could see plaintiff's intestate lying on the side of the track three fourths of a mile distant. He could not tell, from his position and at that distance, whether he was lying across the rail, but thought his head was on the road-bed beyond the ends of the cross-ties; when the engineer was passing, the witness waved his hand at him as a signal to be watchful. The engineer looked, but did not seem to comprehend what was meant. The train was running at the rate of about twenty miles an hour. The witness who made the signal had been engaged at the water-tank for about eleven months, and had been often seen there by the engineer, but had not made his acquaintance.

Could the engineer, by ordinary care, have seen that the plaintiff's intestate was lying apparently helpless upon the track, with his head inside the rail, in time to have stopped the train before it reached him? Defendant's counsel contended that there was no testimony offered to show within what distance the engineer, by using all available appliances, could have stopped the train, and therefore the jury could not consider the question whether he could have avoided inflicting the injury. With the *data* furnished by the evidence, it was the province of the jury, either with or without additional light from expert witnesses, to determine how many feet or yards of track the train must have traversed after the engineer reversed his engine and blew brakes before he could have put a complete stop to its movements without damage to those on the train. The jury were at liberty to exercise their own common sense, and to use the knowledge acquired by their observation and experience in every-day life in solving the question whether the engineer, in the exercise of due diligence, might have discovered, from his elevated position on the engine, the fact that plaintiff's intestate was lying helpless across the rail, and whether, by prompt and strenuous effort, he could have saved his life without putting his passengers in jeopardy: *Lake Shore etc. R. R. Co.* v. *Miller*, 25 Mich. 232;

Nehrbas v. *Central Pac. R. R. Co.*, 62 Cal. 322. Courts and juries acting within their respective provinces must take notice of matters of general knowledge and use their common sense, where the evidence makes the issue of law or fact depend upon their exercise: Best on Evidence, 262, note *f;* Wood on Railways, 1064, note.

If the facts had been undisputed, and such that only one inference could have been drawn from them, it would have been the duty of the court to decide whether there was negligence. But upon the testimony before them in this case, the judge should have left the jury to say whether they could deduce satisfactorily, from the evidence, the inference that the engineer discovered, or could by ordinary care have discovered, that plaintiff's intestate was lying apparently insensible upon the track, in time to have avoided the injury, or whether they thought a preponderance of testimony was in favor of the inference that defendant's employees could not have averted the accident by exercising the diligence required by law: *Smith* v. *Richmond etc. R. R. Co.*, 99 N. C. 241; *Troy* v. *Cape Fear etc. R. R. Co.*, 99 N. C. 298; 6 Am. St. Rep. 521; *Marietta etc. R. R. Co.* v. *Picksley*, 24 Ohio St. 654. Men of fair and reasonable minds might have drawn different conclusions from the evidence in this case, although there is no material conflict between the testimony of the witnesses examined, and therefore the jury should have been allowed to determine whether the engineer might have ascertained, by keeping a proper lookout, the real condition of the deceased, admitting, even, that he was drunk, and by timely exertion have saved him harmless, without peril to the passengers or other persons on the train: 2 Thompson on Negligence, 1178, 1179; Wood on Railways, sec. 319, p. 1259.

Judge Cooley, in his work on torts, page 670, says: "If the case is such that reasonable men, unaffected by bias or prejudice, would be agreed concerning the presence or absence of due care, the judge would be quite justified in saying that the law deduced the conclusion accordingly. If the facts are not ambiguous, and there is no room for two honest and apparently reasonable conclusions, then the judge should not be compelled to submit the question to the jury as one in dispute."

The rule applicable to our case is, that though the facts may be undisputed, yet if two reasonable and fair-minded persons might draw inferences from them so different that ac-

cording to the conclusion of fact reached by one there would be negligence, while that deduced by another would show the exercise of ordinary care, then the issue should be submitted to the jury.

We think that his honor erred in declaring the testimony insufficient, in any aspect of it, to warrant the inference on the part of the jury that the defendant might have prevented the injury by the exercise of ordinary care. There must be a new trial.

CONTRIBUTORY NEGLIGENCE, WHEN DOES NOT BAR RECOVERY. — Contributory negligence cannot be invoked as a defense, unless it is the proximate cause of the injury: *North Birmingham St. R'y Co.* v. *Calderwood*, 89 Ala. 247; 18 Am. St. Rep. 105; or contributed to the injury: *Smith* v. *Irwin*, 51 N. J. L. 507; 14 Am. St. Rep. 699, and note; *Chicago etc. R. R. Co.* v. *Warner*, 123 Ill. 38. Gross negligence on the part of the railroad engineer does not overcome the defense of contributory negligence, unless it is such as raises the presumption of a wanton recklessness: *Carrington* v. *Louisville etc. R. R. Co.*, 88 Ala. 472. The rule that contributory negligence will bar a recovery by a plaintiff does not apply to one injured by a fire set out in the operation of a railroad: *Johnson* v. *Chicago etc. R'y Co.*, 77 Iowa, 666.

RAILROAD COMPANIES — NEGLIGENCE — PRESUMPTION. — When an engineer sees a person upon or crossing the track in time to stop the train, without further knowledge he may presume that he will get off the track in time to avert danger, and it is not negligence in him not to check the train: *Daily* v. *Richmond etc. R. R. Co.*, 106 N. C. 302; *McAdoo* v. *Railroad*, 105 N. C. 141. Compare *Dyson* v. *New York etc. R. R. Co.*, 57 Conn. 9; 14 Am. St. Rep. 82. But if the engineer knows that the signals are not sufficient to warn a person upon the track, if possible he must stop the train, and is negligent in recklessly failing to do so. The contributory negligence of the person on the track is no defense against such conduct of the engineer: *Bouwmeester* v. *Grand Rapids etc. R. R. Co.*, 67 Mich. 87. Compare *McMarshall* v. *Chicago etc. R'y Co.*, 80 Iowa, 757; 20 Am. St. Rep. 445, and note 452, 453; *Heddles* v. *Chicago etc. R'y Co.*, 77 Wis. 228; 20 Am. St. Rep. 106, and note 114, 115. When the danger is such as to imperil the life of a human being, the care demanded of defendant is such as may reasonably be regarded as sufficient to prevent the probability of mischief: *Carver* v. *Plank Road*, 69 Mich. 616. Mere warning in time to prevent accidents is not of itself proper care: *Markham* v. *Houston etc. Co.*, 73 Tex. 247.

NEGLIGENCE A QUESTION FOR WHOM. — Negligence is a question of fact for the jury: *Murray* v. *Missouri P. R'y Co.*, 101 Mo. 236; 20 Am. St. Rep. 601, and note; *Bloomsburg S. Co.* v. *Gardner*, 120 Pa. St. 80; *Kreuziger* v. *Chicago etc. R'y Co.*, 73 Wis. 158; *Newall* v. *Bartlett*, 114 N. Y. 399; *San Antonio etc. R'y Co.* v. *Robinson*, 73 Tex. 277; *McClain* v. *Brooklyn C. R. R. Co.*, 116 N. Y. 460; *Underhill* v. *Chicago etc. R'y Co.*, 81 Mich. 43; *Quinn* v. *South Carolina R'y Co.*, 29 S. C. 381; *White* v. *Railroad Co.*, 30 S. C. 218; *Petrie* v. *Columbia etc. R. R. Co.*, 29 S. C. 304; *Deisen* v. *Chicago etc. R'y Co.*, 43 Minn. 454; *Forker* v. *Sandy Lake Borough*, 130 Pa. St. 124; *Schwartz* v. *Bruhm*, 130 Pa. St. 411; *McAdoo* v. *Railroad*, 105 N. C. 141. And the same is true as to the question of contributory negligence: *Engel* v. *Smith*, 82 Mich. 1; 21 Am. St. Rep. 549, and note; *Chicago etc. R'y Co.* v. *Adler*, 129 Ill. 335; *Brusk R.*

L. Co. v. *Kelley*, 126 Ind. 220; *Underhill* v. *Chicago etc. R'y Co.*, 81 Mich. 43; *Baker* v. *Railroad Co.*, 68 Mich. 91; *Deisen* v. *Chicago etc. R'y Co.*, 43 Minn. 454; *Lent* v. *N. Y. C. & H. R. R'y Co.*, 120 N. Y. 467; *McClain* v. *Brooklyn C. R. R. Co.*, 116 N. Y. 460; *McRickard* v. *Flint*, 114 N. Y. 222; *Lay* v. *Richmond etc. R. R. Co.*, 106 N. C. 404; *Clopp* v. *Mear*, 134 Pa. St. 203; *Bloomsburg S. Co.* v. *Gardner*, 126 Pa. St. 80; *Petrie* v. *Columbia etc. R. R. Co.*, 29 S. C. 303. But where there is no conflict in the evidence, contributory negligence is a question of law for the court: *Apsey* v. *Detroit etc. R. R. Co.*, 83 Mich. 440.

BENNERS *v.* RHINEHART.

[107 NORTH CAROLINA, 705.]

EXECUTIONS. — SALE MADE AFTER DEATH OF JUDGMENT DEBTOR under an execution issued prior to his death vests a good title in the purchaser, and though he is the judgment creditor, this will not avoid the sale, and if it renders it voidable, it can only be attacked directly or by answer calling for the equitable interposition of the court.

ACTION to obtain possession of land. In 1878, the plaintiff obtained and docketed a judgment against one Love, who had acquired a homestead in land in 1875, the lot in question being a part of the excess above the homestead. In 1886, he conveyed his interest in such lot to the defendant. Execution was issued on such judgment on June 6, 1887, and the judgment debtor died the following day. The court held the sale to be void, and plaintiffs appealed.

G. S. Ferguson and W. B. Ferguson, for the appellants.

SHEPHERD, J. The execution under which the defendant purchased was issued before the death of the judgment debtor. The sale was made before the return day of the writ, and after the death of the said debtor.

Did the purchaser acquire a valid title? We were not favored with an argument in support of the ruling of his honor, nor have we been able to find anything in our statute law which conflicts with the decisions of this court and other authorities sustaining the title of a purchaser under such circumstances.

In *Aycock* v. *Harrison*, 65 N. C. 8, Reade, J., speaking for the court, says: "Where there is a judgment and a *fieri facias* or *venditioni exponas* issues during the life of the defendant, the sheriff may proceed to sell, although the defendant die before the sale, and so he may when the *fieri facias* or *venditioni exponas* issue after his death, but is tested before. The reason is, that when the process issues or is tested before the

defendant's death, the ministerial officer can take no notice of his death, but must obey the process, which, being tested before the death, binds the land." In *Halso* v. *Cole*, 82 N. C. 161, Dillard, J., says: "If the execution had been sued in the lifetime of David Cole, or after his death, but with a test antedating his death, the sale might have been made under its mandate, and the title would have passed." To the same effect is *Grant* v. *Hughes*, 82 N. C. 216, and cases there cited.

These adjudications find abundant support in Tidd's Practice, 1034; Freeman on Executions, 37, and the very numerous cases cited by the latter author.

It is true that the purchaser in this case is the execution creditor, but conceding that he is within the principle which affects such a purchaser with notice of all irregularities in the execution, the sale would nevertheless be voidable only, and not having been set aside by any direct proceeding, and the pleadings containing no matter which calls for the equitable interposition of the court (there being only a general denial), we think the purchaser acquired the legal title.

Error.

JUDICIAL SALES — DEATH OF JUDGMENT DEBTOR. — An execution issued and levied upon land after the death of the defendant in execution, upon a judgment rendered against him during his lifetime, is voidable, not void: *Cain* v. *Woodward*, 74 Tex. 549. Under the Iowa code, a sale under such an execution is void: *Bull* v. *Gilbert*, 79 Iowa, 547. And the fact that the property levied on under such an execution was already held by the officer under an attachment writ levied prior to the execution debtor's death will not prevent the application of the rule: *Bull* v. *Gilbert*, 79 Iowa, 547. Yet a sale of realty under an execution issued on a judgment after the judgment debtor's death, but tested prior thereto, made without revivor of the judgment within twelve months after its rendition, is valid: *Montgomery* v. *Realhafer*, 85 Tenn. 668; 4 Am. St. Rep. 780. In *Wingate* v. *James*, 121 Ind. 69, where an order was obtained from the court by a guardian to sell the estate of his ward to pay debts, and the ward died before the sale, the sale, made under a compliance with the statutory provisions, and duly confirmed by the court, was adjudged valid.

JENKINS *v.* WILKINSON.

[107 NORTH CAROLINA, 707.]

NEGOTIABLE INSTRUMENTS — EXTENSION OF TIME OF PAYMENT — GUARANTOR. — Where a promissory note is not paid at maturity, and a third person, in consideration of an extension of the time of payment, agrees in writing to guarantee its payment, provided the payee would hold a mortgage as collateral security, such third person thereby becomes a guarantor for the payment of the note upon default by the maker.

NEGOTIABLE INSTRUMENTS — LIABILITY OF GUARANTOR OF PAYMENT. — A guarantor for the payment of a note is liable as upon an absolute promise to pay upon default in payment by the maker.

NEGOTIABLE INSTRUMENTS — LIABILITY OF GUARANTOR FOR COLLECTION. — A guarantor for the collection of a note is liable as upon a promise to pay upon condition that the payee shall diligently prosecute the maker without success.

ACTION upon a note given by T. A. H. Wilkinson in favor of T. T. Jenkins, and not paid at maturity. One Nancy Wilkinson then agreed in writing, that, in consideration of an extension of time granted for the payment of the note, she would guarantee its payment, provided that the payee would hold a certain mortgage as collateral security for its payment. Upon compliance with the conditions of such agreement, and default in the payment of the note, the payee brought this action, and recovered judgment, from which defendant appeals.

C. W. Tillett, for the respondent.

SHEPHERD, J. There is a plain distinction between a guaranty of payment and a guaranty of collection. "The former is an absolute promise to pay the debt at maturity, if not paid by the principal debtor, and the guarantee may begin an action against the guarantor. The latter is a promise to pay the debt upon the condition that the guarantee shall diligently prosecute the principal debtor without success": *Jones* v. *Ashford*, 79 N. C. 173; Baylies on Sureties and Guarantors, 113.

This case belongs to the former of these classes, and the plaintiff, having complied with the terms imposed upon him by the contract, had a right to sue the defendant Nancy Wilkinson upon the maturity of the obligation.

Her agreement was, not to pay after the plaintiff had exhausted the mortgage security, but it was absolute upon default of the debtor, and the requirement that the plaintiff was not to surrender the mortgage was only for her protection by way of subrogation, in the event of her being compelled to pay the debt.

No error.

NEGOTIABLE INSTRUMENTS — PROMISSORY NOTE — LIABILITY OF GUARANTOR FOR PAYMENT. — A surety on a promissory note cannot defeat his liability by proof that he delivered it to the principal on condition that it be signed by another surety, which condition was not fulfilled: *Ward* v. *Hackett*, 30 Minn. 150; 44 Am. Rep. 187; *Jordan* v. *Jordan*, 10 Lea, 124; 43 Am. Rep. 294; *Dixon* v. *Dixon*, 31 Vt. 450; 76 Am. Dec. 128. One who executes a note apparently as principal, but really as surety, cannot avoid liability to payee by reason of the agreement of the surety with the principal for extension of the time of payment: *McCloskey* v. *Indianapolis etc. Union*, 67 Ind. 86; 33 Am. Rep. 76, and note. The guarantor of a promissory note is bound to pay the same after default by the maker: *Jones* v. *Thayer*, 12 Gray, 443; 74 Am. Dec. 602, and note; *Peck* v. *Frink*, 10 Iowa, 193; 74 Am. Dec. 384, and note; *Hungerford* v. *O'Brien*, 37 Minn. 306; *Kirkpatrick* v. *Gray*, 43 Kan. 434.

STATE *v.* JACOBS.

[107 NORTH CAROLINA, 772.]

CRIMINAL LAW — FUGITIVE FROM JUSTICE, RIGHT OF, TO BE HEARD ON APPEAL. — In courts of appeal, where none but questions of law can be reviewed, and in the absence of any statute specifically regulating the practice, if there is satisfactory evidence that a defendant, whose appeal is founded upon exceptions entered on the trial below, has been regularly called for hearing, has escaped, and is not in custody, it is clearly within the sound discretion of the court, in the absence of defendant and his counsel, to determine whether the exceptions shall be passed upon, the appeal dismissed, or the hearing postponed until the recapture of the defendant. Any judgment pronounced by such court in such case will not be void. Even when the court may review the facts, a defendant who escapes pending his appeal is deemed to have waived his right to be present on the final hearing.

CRIMINAL LAW — PRESENCE OF PRISONER ON APPEAL. — The constitutional right of a party charged with crime to be present at his trial, to be informed of the charge against him, to introduce evidence, and to be represented by counsel extends only to the trial court, and does not apply to the appellate court, having jurisdiction to review only errors of law.

CRIMINAL LAW — PRESENCE OF ACCUSED ON APPEAL. — In a criminal case on appeal, the appellate court, having only jurisdiction to review questions of law, may proceed to hear and determine the case, and to enter judgment, whether the accused is charged with a misdemeanor or a capital felony, and whether he is or is not at the time of the hearing under bond for his appearance, in prison, or has escaped and is at large.

Theodore F. Davidson, attorney-general, for the state.

B. C. Beckwith, for the defendant.

AVERY, J. The exceptions taken by the defendant, Jacobs, were reviewed at the last term of this court in a well-considered opinion filed by Justice Clark, 106 N. C. 695. It now appears by certificate of the clerk of the superior court of

Robeson County, and is admitted by the attorney-general for the state, that at the time when the appeal was heard here, the prisoner Jacobs had escaped from custody, and was not recaptured till about August, 1890. Counsel now insist that this court shall treat the decision made at the February term as inconclusive upon the prisoner, and hear another argument of his appeal, because he was neither actually nor constructively in custody when the exceptions were argued.

In appellate courts, where questions of law only can be reviewed, and in the absence of any statute specifically regulating the procedure, if there be satisfactory evidence that a defendant, whose appeal is founded upon exceptions entered on the trial below and has been regularly called for hearing, has escaped, and is not in actual or constructive custody, it is clearly within the sound discretion of the court to determine whether the exceptions shall be argued and passed upon, the appeal dismissed, or the hearing postponed to await the recapture of the alleged offender: *Smith* v. *United States*, 94 U. S. 97; *Bonahan* v. *Nebraska*, 125 U. S. 692; *Leftwich's Case*, 20 Gratt. 722; *Sherman* v. *Commonwealth*, 14 Gratt. 677; *McGowan* v. *People*, 104 Ill. 100; 44 Am. Rep. 87; *Wilson* v. *Commonwealth*, 10 Bush, 526; *State* v. *Sites*, 20 W. Va. 16. In the exercise of this power, the courts of the different states have not adopted uniform rules of practice, even where there are no statutory or constitutional provisions regulating the mode of procedure. But while the general, if not universal, rule has been to refuse a motion of a defendant who had absconded and put himself in contempt of court, to dispose of his appeal or make any order affecting it at his instance or for his benefit, the courts of the different states have, as a general rule, where there was no express statutory requirement in reference to it, and where the prosecuting officer was the moving party, continued, dismissed, or heard the appeal, according to the circumstances of the case or the early precedents of the particular court: *Anonymous*, 81 Me. 592; *Commonwealth* v. *Andrews*, 97 Mass. 544; *People* v. *Genet*, 59 N. Y. 81; 17 Am. Rep. 315; *Warwick* v. *State*, 73 Ala. 486; 49 Am. Rep. 59.

In *Smith* v. *United States*, 94 U. S. 97, Waite, C. J., delivering the opinion, said: "It is clearly within our discretion to refuse to hear a criminal case in error, unless the convicted party suing out the writ is where he can be made to respond to any judgment we may render. If we affirm the judgment, he is not likely to appear to submit to his sentence. If

we reverse it, and order a new trial, he will appear or not, as he may consider most for his interest." The reasoning of the learned chief justice has been adopted and his language quoted in many of the more recent decisions as to the right to refuse a request from the defendant that the court pass upon his exceptions while he is absconding and in contempt. And even where the appellate courts review the facts, a defendant who escapes pending his appeal is deemed to have waived his right to be present on the final hearing upon his assignment of errors: *Commonwealth* v. *Andrews*, 97 Mass. 544; *Wilson* v. *Commonwealth*, 10 Bush, 526; *People* v. *Genet*, 59 N. Y. 81; 17 Am. Rep. 315.

The court of appeals of Virginia laid down the rule in *Sherman* v. *Commonwealth*, 14 Gratt. 677, that where a prisoner convicted of a felony has obtained a writ of error, which was directed to operate as a *supersedeas*, and then escaped from jail, the appellate court will discharge so much of the order as awards the *supersedeas*, and direct that the writ of error be dismissed on a day certain, unless the defendant shall have been, meantime, rearrested and placed in custody of the proper officer. The same rule was subsequently adopted in Illinois, West Virginia, and Alabama: *McGowan* v. *People*, 104 Ill. 100; 44 Am. Rep. 87; *State* v. *Sites*, 26 W. Va. 16; *Warwick* v. *State*, 73 Ala. 486; 49 Am. Rep. 59.

The courts of Georgia, Indiana, and Kentucky have concurred in holding that it is the proper practice to dismiss, on motion of the prosecution, unconditionally, an appeal by one charged with a felony, where it is made to appear satisfactorily that he has escaped custody pending the appeal, and is still at large: *Madden* v. *State*, 70 Ga. 383; *Sargent* v. *State*, 96 Ind. 63; *Wilson* v. *Commonwealth*, 10 Bush, 526. In *Leftwich's Case*, 20 Gratt. 722, the court of appeals of Virginia, having held that the judgment of the circuit court, by virtue of which the defendant had been sent to the penitentiary for three years, was erroneous, ordered that he be brought before the appellate court by *habeas corpus*, when it appeared that he had escaped, and was not in custody at the time of the hearing. The court refused to set aside the judgment sustaining the exceptions of the defendant.

In our case, the judgment of the court below was affirmed here, and the governor issued the death-warrant by virtue of section 3, chapter 192, Laws of 1887, fixing the time of execution on September 26th, but has respited the prisoner in order

that the question presented by the motion before us might be considered. So that we are confronted with a question not directly raised in any of the cases already cited, though it was discussed, *arguendo*, in a few of them, and covered by the broad propositions stated in others.

In the case of *State* v. *McMillan*, 94 N. C. 945, it was declared to be the settled practice of this court to refuse the motion of the attorney-general to dismiss appeals where the defendant charged with a felony escaped after filing his exceptions below, and was not in custody when the case was called for argument in this court, and this rule was enforced in two other cases subsequently considered at the same term: *State* v. *Pickett*, 94 N. C. 971; *State* v. *Brocksville*, 94 N. C. 972. The present chief justice, delivering the opinion in *State* v. *McMillan*, 94 N. C. 945, said: "The court will not do a vain and nugatory thing. The appellant may never be rearrested. The decision would be empty and fruitless. The court will not, ordinarily, hear and determine an appeal when it sees that its orders and judgments cannot be enforced by itself, or through the superior court, as the law directs."

The provisions of chapters 191 and 192, Laws of 1887, enacted since that opinion was filed, meet the argument that it would prove fruitless to dismiss an appeal which a defendant has voluntarily waived his right to prosecute, by giving the clerk or the governor, or both conjointly, the power to order the original judgment, which has been stayed, not vacated, to be executed or enforced. Since the passage of the acts constituting the chapters mentioned, whether an appeal taken by a defendant in a criminal action be dismissed or affirmed in this court, the stay of execution will be removed, and the law will require the sentence of the court to be carried into effect in the manner indicated in the statute, either by warrant of the governor or by virtue of execution issued directly to the sheriff of the county. This radical change in the manner of executing the criminal law obviates the objection growing out of the fact that it remains for the court below not only, under its process, to recapture, but likewise to resentence at a regular term. In *State* v. *McMillan*, 94 N. C. 945, the court says: "Besides, to dismiss the appeal might raise embarrassing questions in the superior court if the appellant should be rearrested. Would the dismissal reinstate the judgment of death vacated by the appeal, or operate to leave that judgment in force, as if no appeal had been taken? Could such a result supervene in

the absence of the prisoner, whether such absence be occasioned by his escape or otherwise?" The question propounded by the court has been in part met by the express provision of the statute, and it remains for us to construe the law so as to answer the interrogatory left open still, by deciding whether a judgment of this court, rendered after the prisoner's escape, and before his recapture, would constitute a valid disposition of the appeal, so that the stay of execution below would be removed. The discussion of this point (incidentally and entirely *obiter*) by some of the courts has given rise to confusion, because of the failure to advert to the fact that counsel were not allowed in England, until 1836 (by 6 & 7 Wm. IV., c. 114), to make a full defense for persons charged with any felony other than treason, while in the United States it was a universal principle of constitutional law that a man accused of a crime (whether a misdemeanor or a felony) was allowed a defense by counsel, both upon the law and the facts: Cooley's Constitutional Limitations, 130–135, and notes; *Vise* v. *Hamilton*, 19 Ill. 78. The right "to have counsel for his defense" is distinctly guaranteed to the accused "in all criminal prosecutions" by an amendment to the original declaration of rights, incorporated in 1868: Const., art. 1, sec. 2. There is no sufficient reason and no well-considered authority for restricting the right and duty of counsel who have been employed by a person indicted for a felony, have entered his exceptions and appealed, and aided in settling the statement of case on appeal, so that they will not be allowed or expected, in the discharge of their duty to their clients, to appear in the appellate court at every stage of the procedure there, whether the client be a fugitive or a prisoner. The relation of counsel and client is such that the former, having once engaged to represent the latter, cannot withdraw without leave of the court for cause shown: Cooley's Constitutional Limitations, 335. But it is not essential in North Carolina, where the appellate court does not review the facts, that the client, though indicted for a capital felony, should be present in this court, or should be in actual or constructive custody, so as to communicate with his counsel after the trial in the court below, including judgment, exceptions, and appeal, is ended. In *State* v. *Overton*, 77 N. C. 486, Justice Reade, for the court, says: "The constitution provides that a defendant in a criminal action shall be informed of the accusation against him, and shall have the right to confront the accusers with other testimony, and shall not be convicted

except by the unanimous verdict of a jury of good and lawful men in open court, as heretofore used. That is his trial. This, of course, implies that he shall have the right to be present. If he complains of any error in his trial, the record of the trial is transmitted to this court. It has never been understood, nor has it been the practice, that the defendant shall be present in this court, nor is he ever 'convicted' here." See also *State* v. *Leak*, 90 N. C. 656.

This court has repeatedly held that nothing should be done prejudicial to the rights of a person on his trial for a capital felony unless he is actually present; while on trial for misdemeanors it is sufficient if the defendant assents through counsel when any order is made or any step taken affecting his rights: *State* v. *Weaver*, 13 Ired. 203; *State* v. *Jenkins*, 84 N. C. 812; 37 Am. Rep. 643; *State* v. *Epps*, 76 N. C. 55; *State* v. *Paylor*, 89 N. C. 539; *State* v. *Sheets*, 89 N. C. 548. But the distinction is clearly drawn in *State* v. *Overton*, 77 N. C. 486, between the trial below, at which the defendant has the right to be present and confront his accusers, by virtue of the declaration of rights, in all criminal prosecutions (but may waive that right except in trials for capital felonies, and consent that his counsel shall represent him), and the hearing in appellate court, where it is not essential in any case that the accused should be actually present, or that counsel who represent him should know that he has not absconded. One on trial for a capital felony must confront his accusers in person at every stage of his progress, and the law does not permit him to waive his right or delegate to another the power to represent him in the examination of an issue involving his life, or certainly not by implication. But now that it is settled that even one convicted of a capital felony may be represented by counsel (and not in person) when this court hears argument upon his exceptions, and that this court may affirm the judgment of the court below, and direct the clerk to notify the governor so that a death-warrant may issue in the absence both of client and counsel, it is difficult to discover any principle of constitutional, common, or statute law that gives a defendant who is in hiding and in contempt the right to insist upon setting aside and annulling a judgment of this court because he was "in the woods" instead of in the prison, and could not therefore communicate by letter or telegram with counsel engaged to represent him and protect his interests in this court. It would have been absurd if the appeals of Jacobs

and Oxendine in this case had been heard together, decided in one opinion, and disposed of by one decree affirming judgment as to both, to have afterwards held that any principle of law would compel the court to execute the judgment as to Oxendine, who remained in jail, and grant a new hearing as to the defendant Jacobs because he was in the swamps of Robeson County and could not advise his learned counsel by letter what steps he ought to take in the management of his appeal here.

In *State* v. *Leak*, 90 N. C. 656, the court passed upon a motion of counsel for a defendant charged with a misdemeanor (fornication and adultery) to withdraw his appeal, and the motion was allowed. The question whether the appellate court should grant a motion made by counsel, and not supported by affidavit or direct authority from one charged with a capital felony, to dismiss the appeal of the latter, did not arise in that case, and has never been decided by this court.

It seems, as already stated, that the court of appeals of Virginia not only directed, when notified of the escape of an appellant, that his appeal should stand dismissed unless it should be made to appear that he was in custody before a certain day but discharged immediately the order that the writ of error should act as a *supersedeas: Sherman* v. *Commonwealth*, 14 Gratt. 677. We infer that *supersedeas* is used in the sense of stay of execution, and that the effect of discharging the *supersedeas* would be the same as a dismissal of an appeal in this court since the passage of the act of 1887. Abbott's Law Dict., tit. Supersedeas, 523; *Williams* v. *Bruffy*, 102 U. S. 249; *Smith* v. *Western Union Tel. Co.*, 83 Ky. 271; *Hovey* v. *McDonald*, 109 U. S. 159. The Texas court of appeals declared constitutional an act which provided that, in case a defendant should escape from prison pending his appeal, the jurisdiction of the appellate court should no longer attach and the appeal should be dismissed, and in discussing the subject declared that, in the absence of any statutory provision, an escape should be considered an abandonment of an appeal: *Brown* v. *State*, 5 Tex. App. 129; *Loyd* v. *State*, 19 Tex. App. 155. The case of *People* v. *Bedinger*, 55 Cal. 290, involved only a construction of an express provision of the constitution and a statute of the state of California, and the citation of 4 Blackstone, 855, which is a summary of the law in force in England prior to 1836, was not applicable in this country, because the provisions of the organic law in nearly

all of the states secure the right of representation by counsel in all cases and at all stages of the prosecution.

If we concede that the right of the accused to be present, or in communication with his counsel, extends beyond the time when the *nisi prius* court is actually engaged in the trial of the indictment preferred against him, it gives rise to many embarrassing questions. If the defendant has the right to confront his accusers or to be in such a position that he can direct or assist his counsel, after verdict and judgment below, while his appeal is pending, there is even greater reason for his presence, at least by counsel acting under his advice, when many preliminary steps are taken by witnesses, prosecuting officers, and grand juries. Yet this court has denied the right of the accused to have a dying declaration excluded on the ground that he could not confront his accuser, and has admitted testimony as to an examination of a defendant's tracks, in his absence, in the face of a similar objection: *State* v. *Tilghman*, 11 Ired. 513; *State* v. *Morris*, 84 N. C. 759. This court has condemned, in very severe terms, too, any attempt to compel grand juries to conduct their investigations in the presence of the public or the accused, even though the question before them may be whether the life of a citizen shall be placed in jeopardy by the finding of an indictment charging him with a capital felony: *State* v. *Branch*, 68 N. C. 186; 12 Am. Rep. 633. If this court had never considered any of these questions, it would be much more important to extend the right of the accused so that he could confront those who, by acts or declarations, make or prepare testimony to be used on the trial below, than to secure to him the privilege of advising counsel, learned in the law, as to questions about which the client is usually profoundly ignorant. But this court, in the case of *State* v. *Kelly*, 97 N. C. 404, 2 Am. St. Rep. 299, has held that where a defendant charged with a felony of lower grade (less than capital) is present when his trial begins in the court below, and, being under bond for his appearance, is in constructive custody, but voluntarily absents himself or flees during the progress of the trial, he thereby impliedly waived his right to be present at all subsequent stages, up to and including the rendition of the verdict. Surely, then, if an alleged criminal can, by implication, surrender his acknowledged constitutional right to meet his accusers in the forum where the facts are investigated, and where he is supposed, on account of his peculiar knowledge, to be able to aid

his counsel, it will not infringe upon any important principle or subject him to peril from which he should be protected, to concede that a higher court, having only cognizance of questions of law that may be as thoroughly discussed in his absence as in his presence, may proceed to hear and determine issues arising out of his appeal, and enter its judgment, whether the defendant be charged with a misdemeanor, a capital felony, or one of lower grade, and whether he be, at the time of the hearing, under bond or recognizance for his appearance, in prison, or in the woods.

The motion of the counsel for the defendant is not allowed. Let this opinion be certified, to the end that the judgment of the court may be executed as provided by law.

Motion refused.

CRIMINAL LAW — APPEAL — EFFECT OF APPELLANT'S ESCAPE FROM CUSTODY. — It seems to be the general rule that where a convicted prisoner takes an appeal, and escapes from custody pending the appeal, that the appeal will be dismissed: *Warwick* v. *State*, 73 Ala. 486; 49 Am. Rep. 59; *McGowan* v. *People*, 104 Ill. 100; 44 Am. Rep. 87, and note; *Wilson* v. *Commonwealth*, 16 Bush, 526; 19 Am. Rep. 76; *People* v. *Genet*, 59 N. Y. 80; 17 Am. Rep. 315. But in *State* v. *Plazencia*, 6 Rob. (La.) 441, 41 Am. Dec. 271, it was decided that fleeing from justice neither destroys nor impairs a party's right to appeal from a judgment against him.

STATE *v.* WEBBER.

[107 NORTH CAROLINA, 962.]

CRIMINAL LAW — HOUSE OF ILL-FAME — EVIDENCE. — To prove the charge of keeping a bawdy-house or house of ill-fame, it must be shown that it was a common resort of people of both sexes for the purpose of prostitution, and proof of acts of illicit intercourse on the part of the occupants, without proof that it was kept for the convenience of people who visited it to indulge in lewdness, will not sustain the charge.

MUNICIPAL CORPORATIONS — ORDINANCE — SUPPRESSION OF HOUSES OF ILL-FAME. — An ordinance enacted by a municipal corporation providing that the permitting of prostitution by the owner or occupant of a house shall constitute him the keeper of a house of ill-fame, and declaring what shall constitute such house, and establishing a rule of evidence to determine the question, is void, and not authorized under a general power to enact ordinances for the government of the corporation, and to abate or prevent nuisances.

MUNICIPAL CORPORATION. — ORDINANCE VOID IN PART IS VOID ALTOGETHER, where all its parts are connected with and essential to each other.

MUNICIPAL CORPORATIONS — ORDINANCE — SUPPRESSION OF HOUSE OF ILL-FAME. — Under express power in a municipal corporation to suppress houses of ill-fame, the city has no power to enact an ordinance that per-

sons not guilty of a nuisance under established principles of law shall be deemed guilty of keeping houses of ill-fame, and to prescribe new rules of evidence to be adopted on the trial.

MUNICIPAL CORPORATION — ORDINANCE — SUPPRESSION OF HOUSES OF ILL-FAME. — Under general power in a municipal corporation to suppress houses of ill-fame, an ordinance forbidding owners from renting their houses to others for the purpose of prostitution, or with knowledge that they were to be so used, is valid; but such general power does not authorize the city to declare, by ordinance, that a certain house is a house of ill-fame, or to define and declare what is such a house.

CRIMINAL LAW. — VIOLATION OF VOID MUNICIPAL ORDINANCE is not a criminal offense.

APPEAL from a conviction under an indictment founded on the following sections of a city ordinance: "Sec. 657. That the occupant or owner of any house or room, or part of the same, within the city of Asheville who shall suffer or allow prostitution therein, or males and females to cohabit therein, without then and there being lawfully married, shall be deemed the keeper of a house of ill-fame, and be fined, on conviction, the sum of fifty dollars. Sec. 658. Circumstances from which it may be reasonably inferred that any house is inhabited or frequented by disorderly persons or persons of notorious bad character shall be sufficient to establish that such house is a disorderly, or house of ill-fame." Section 659 is sufficiently stated in the opinion.

Theodore F. Davidson, attorney-general, for the state.

V. S. Lusk, for the defendant.

AVERY, J. In *State* v. *Calley*, 104 N. C. 858, 17 Am. St. Rep. 704, it was held that, in order to prove the charge of keeping a bawdy-house or house of ill-fame, it must be shown that it was a common resort of people of both sexes for the purpose of prostitution, and that it was not sufficient to prove acts of illicit intercourse on the part of the occupants without showing also that it was kept for the convenience of people who visited it to indulge in lewdness. The aldermen were not authorized, by virtue of the power given them by the legislature to "abate or prevent nuisances" or to pass "such ordinances, by-laws, rules, and regulations for the better government of the city as they deemed necessary," to enact a law declaring that not only suffering or allowing prostitution, but permitting single acts of illicit sexual intercourse in a house or room, should constitute the owner or occupant of the room or house the keeper of a house of ill-fame. To lay the foundation for suppressing, they first declare (in section 657)

that a bawdy-house which the law declares is not one. In the next section (658), they assume, without warrant, the right to enact a rule of evidence, and that section, whether in consonance with or repugnant to the established rules of testimony, is void. Competent testimony would be admissible, on the trial of a properly constituted case, under the general law of evidence, not by reason of the passage of a by-law without authority. But it is scarcely necessary to say that circumstances which justify the reasonable inference that a house is either "inhabited or frequented by disorderly persons or persons of notoriously bad character" are not, without further testimony tending to show actual disorder or prostitution, sufficient to go to the jury to establish a charge of keeping either a disorderly house or a bawdy-house. It is provided in section 659 that when any owner or occupant, after it is "so adjudged" (viz., under the preceding void ordinance affixing a penalty, and the other void ordinance changing the rules of evidence) that his home, building, or room is a house of ill-fame or bawdy-house, shall continue for two days longer to allow "disorderly persons or persons of notorious bad character" to frequent such house or room, he shall be fined fifty dollars, and the chief of police shall guard such house, and keep the inmates within the same, until a warrant can be procured for the arrest of such owner or occupant. This last section is void, because it hinges on and is dependent upon the two preceding sections, they being so connected that the liability to the fine under the last section depends upon a previous conviction under section 657, which was enacted without authority, and that conviction could be made under the evidence declared sufficient without the power to do so in section 658. "If a part of a by-law be void, another essential and connected part of the same by-law is also void": 1 Dillon on Municipal Corporations, sec. 354 (421), and note 2 (to 4th ed.); *Commonwealth* v. *Hitchings*, 5 Gray, 482.

In volume 1, section 89 (55), Dillon says: "It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: 1. Those granted in express words; 2. Those necessarily or fairly implied; 3. Those essential to the declared objects and purposes of the corporation, — not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied." The power to

prevent nuisances does not, directly or by implication, carry with it the authority to hold the owner of a building, who may never himself visit it, responsible for the nuisance of keeping a house of prostitution, bawdy-house, or house of ill-fame, committed by his tenant without his knowledge or consent, and subject him to a fine, to say nothing of the disjunctive liability to be deemed the keeper of a house of ill-fame and to have the inference drawn against him on account of the bad character rather than the conduct of those who occupy his houses as lessees or frequent them. Such a by-law is not only unauthorized, but unreasonable.

If the power to suppress bawdy-houses had been given in express terms, as has been done in some instances, the city could not even then have usurped the authority to enact that persons not guilty of nuisance under the established principles of law should be deemed guilty of keeping bawdy-houses, and to prescribe new rules of evidence to be adopted on the trial: *City of Charlton* v. *Barber*, 54 Iowa, 360; *Darst* v. *People*, 51 Ill. 286; *City of Mt. Pleasant* v. *Breese*, 11 Iowa, 399; Wood on Nuisances, secs. 740, 741; 1 Dillon on Municipal Corporations, secs. 309, 310.

If the words "be deemed the keeper of a house of ill-fame and" were treated as surplusage, the ordinance, after striking them out, would not be valid, because the city had no express authority to impose a penalty on owners as well as occupants, not only where prostitution, but also where any illicit intercourse whatever is allowed in a house or a room separately leased or sublet, and under a general power to suppress, much broader than that given to the city by the charter or general law, such a by-law would have been declared unreasonable. Under a general power to suppress houses of ill-fame, it has been held that an ordinance was valid which forbade owners from renting their houses to others for the purpose of using them as bawdy-houses, or with a knowledge that they were to be so used, but such general law does not empower a city to declare that a given house is kept as a house of prostitution, or to define and declare what is a house of ill-fame: 1 Dillon on Municipal Corporations, secs. 376 (310), 375 (309), and notes.

The violation of a valid ordinance is, under the provisions of section 3820 of the code, a misdemeanor, but it is not a criminal offense to disregard one enacted without authority: *State* v. *Hunter*, 106 N. C. 796.

There was error. The judge below, upon the introduction of the ordinances and the development of all the evidence, ought to have instructed the jury to return a verdict of "not guilty," and there must be a new trial.

CRIMINAL LAW — HOUSE OF ILL-FAME, WHAT CONSTITUTES. — An indictment for keeping a house of ill-fame is sustained by proof that it was kept by defendant as a house of ill-fame, and resorted to for purposes of prostitution: *State* v. *Lee*, 80 Iowa, 75; 20 Am. St. Rep. 401, and note, with a number of cases collected to show what evidence is admissible to establish the character of such a place. Where the evidence showed that the house was the resort of lewd men and women, it was sufficient to support a verdict of guilty of keeping a house of ill-fame: *State* v. *Toomba*, 79 Iowa, 741; *People* v. *Mallette*, 79 Mich. 600; *Hersinger* v. *State*, 70 Md. 278; *Commonwealth* v. *Shea*, 150 Mass. 314.

MUNICIPAL CORPORATION — ORDINANCE — VALIDITY. — Unauthorized provisions of a municipal ordinance do not invalidate the whole ordinance, if they can be separated from the rest of the ordinance without so mutilating it as to render it inoperative: *People* v. *Armstrong*, 73 Mich. 288; 16 Am. St. Rep. 578, and note; *Poyer* v. *Village of Des Plaines*, 123 Ill. 111; 5 Am. St. Rep. 494; *Ex parte Byrd*, 84 Ala. 17.

MUNICIPAL CORPORATION — INVALID ORDINANCE, VIOLATION OF, NO OFFENSE. — A prisoner detained under an invalid ordinance will be discharged on *habeas corpus*: *Ex parte O'Leary*, 65 Miss. 180; 7 Am. St. Rep. 640.

INDEX TO THE NOTES.

ACCRETIONS, land-owner's right to, 202.

ACTIONS, definition of local and transitory, 22.
distinction between local and transitory, 22.
fraudulent transfer, actions to set aside, whether local or transitory, 26.
local, actions for burning trees, fences, etc., 23.
local, actions to recover damages for overflowing a mill, 23.
local, assessments of lands, actions to enforce, are, 23.
local and transitory, distinction between, 22.
local and transitory, statutes obliterating distinctions between, 23.
local and transitory, whether may be united, 22.
local, condemnation of lands for public use, actions for, are, 23.
local, covenant, actions of, founded on privity of estate, are, 23.
local, deeds absolute, actions to have, adjudged to be mortgages, are, 24, 26.
local, land, actions for flooding, 23.
local, land, actions founded upon privity of estate in, are, 23.
local, private way, actions for obstructing, are, 23.
local, reformation of contracts for sale of land, actions for, are, 24.
local, replevin, actions of, when are, 24.
local, specific performance, suits for, 23.
local, transfer, action to be set aside as fraudulent, 26.
local, trespass *quare clausum fregit*, actions of, are, 23.
local, where must be brought, 22.
officers, actions against, where must be brought, 23.
persons and personal property, actions for injuries to, are transitory, 22, 24.
replevin, whether local or transitory, 25.
survivorship of, for personal injuries, 194.
tests by which to determine which are local and which transitory, 22.
township, actions against, where must be brought, 23.
transitory, assault and battery, actions for, are, 25.
transitory, *assumpsit* for use and occupation of real estate, 25.
transitory, buildings, actions for injuries to, 25.
transitory, contracts, actions founded upon, are, 22.
transitory, damages from accidents, actions for, are, 24.
transitory, injuries to persons or personal property, actions for, are, 22, 24.
transitory, judgments, actions upon, 25.
transitory, land, actions for chattels separated from, 24.
transitory, land, actions for entering upon and destroying crops, timber, and committing other trespasses, 25.
transitory, trover, actions of, are, 24.

ACTIONS, transitory, trover for sand removed from land in one state and transferred to another, 24.
transitory, trover in one state for timber cut in another, 24.
transitory, warranty of title, actions upon covenant of, 25.
ADMINISTRATORS AND EXECUTORS, contracts of decedents, duty of, to complete performance of, 812, 813.
contracts of decedents, liability for breaches of, 811, 812.
ANIMALS, vicious, liability of owner for injuries inflicted by, 722.
APPROPRIATION OF PUBLIC MONEYS, act making, need not be styled an appropriation, 645.
constitutional provision limiting time for which may be made, 647.
constitutional provision may operate as a, 646.
contract impairing obligation of, by repeal of statute making an appropriation, 647.
definition of, 739.
for expenses of government has precedence over general appropriations, 646.
form in which may be made, 643, 644.
fund out of which payment is to be made need not be named, 642.
funds need not be in treasury before making of, 640, 641.
may be implied, 645.
may be prescriptive, 639.
payable out of moneys in the treasury not otherwise appropriated, 642.
precedence between different classes of appropriations, 646, 647.
repeal of the statute making, when inoperative, 647.
required to be made by the constitution, is a mere expression of the legislative will, 639.
required to be only in pursuance of law, 638, 639.
salary of public officer, statute fixing, when equivalent to an, 645.
specific may have precedence over general, 646.
specific, what is, 640,
technical words not essential to, 645.
vested rights in, 643.
what is not, 638, 639.
what is requisite to, 640.
ATTACHMENTS, non-residence within the meaning of the attachment laws, 873.

BANKS, check, drawee cannot recover of bank upon, 876.
deposit of money in, effect of, 875.
relation between, and their depositors, 834.
special deposits in, 876.
BOUNDARIES, agreements establishing, 35.
disputed, proceedings to settle, 36.

CARRIERS, access to depots and grounds of, special privilege concerning, 699-702.
against what liabilities are insurers, 452.
burden of proof respecting negligence of, 788.
connecting, which answerable for loss, 58.
depot, right of, to exclude persons from, 699.
depot, right of, to grant exclusive privileges to persons in and about, 699.
exclusive privileges, agreement to grant, whether against public policy, 699.
express companies, grants of exclusive privileges to, 700, 701.

CARRIERS, liability, statutes limiting, 58.
limitations of liability of, by contract, 452.
of passengers, care which must exercise, 768.
omnibus, right of, to exclude line of, from depot and grounds, 699.
preferences by, when unlawful, 699.
special privileges, grants of, decisions sustaining, 701, 702.
special privileges, grants of, when unlawful, 700.
CERTIORARI to review judgments punishing contempts of court, 421–423.
CHILDREN, damages, machinery, liability for not guarding from, 174.
measure of damages in actions for causing death of, 174.
CONSTITUTIONAL LAW, appropriations of public moneys required to be made only in pursuance of law, 638.
appropriations of public moneys, what are, and when valid, 638–642.
CONTEMPT OF COURT, appeal does not lie from judgment punishing, 417.
appeal from judgment punishing, whether operates as a stay of proceedings, 420.
appeal, what questions reviewable upon, 419, 420.
certiorari does not annul judgment punishing, if the court had jurisdiction, 421.
certiorari, review by, 420, 421.
discretion of court in punishing, when reviewable, 419.
error in order disobeyed is no excuse for, 419.
habeas corpus to obtain discharge from imprisonment under, will not be ordered unless judgment is void, 422.
habeas corpus to obtain relief from judgment punishing, 422.
in disobeying injunction, 418, 419.
injunction to prevent punishment for, 425.
judge is not personally liable for punishing party for, 425.
jurisdiction of court may always be questioned, 418.
pardon of person guilty of, 425.
prohibition to prevent punishment for, 425.
question of fact cannot be reviewed upon appeal, 420.
review of judgment punishing, 417.
review of judgments punishing, statutes permitting, 418.
stay of judgments punishing, whether appeal operates as a, 420.
witness committed for, will not be released upon appeal, 418.
CONTRACTS, breach of, after contractor's death, who liable for, 812.
breach of, before contractor's death, who liable for, 812.
death, contract of guaranty is not terminated by, 814.
death, contract of suretyship is not terminated by, 814.
death, contract to marry is terminated by, 813.
death, joint obligor, effect of, on his liability, 814.
death of contractor does not discharge obligation of, 812.
death of contractor does not excuse performance of, 812.
death of contractor, duty of performing contract, on whom devolves after, 812.
death of contractor, personal contracts which are terminated by, 812.
dissolution of, by death, 813.
executors and administrators, when bound by, 811.
joint obligors, death of one of several, 814.
of authors, when terminated by their death, 812.
personal representatives, when bound by, 811.
termination by death, instances of, 812, 813.

CONTRACTS, time, when of essence of, 243.
CONVEYANCES, registration of, index, whether an essential part of, 166.
registration of, when complete, 166.
CORPORATIONS, directors, personal liability of, 530.
knowledge of proceedings, when imputed to officers and share-holders, 821.
CRIMINAL LAW, larceny, indictment for, description of property in, 154.

DEATH, dissolution of contracts by, 818.
guaranty is not terminated by, 814.
of author, when terminates contract of, 812.
of contractor, duty of heirs and representatives to perform his contracts after, 811, 812.
of contractor, when terminates contract of, 812.
of one of several joint obligors, 814.
DEFINITION of appropriation of public moneys, 639.
of continuous easement, 570.
of monuments in surveys, 34.
of navigable watercourse, 201.
of subrogation, 192.
of transitory and local actions, 22.
DESCRIPTION of lands in contract of sale, when sufficient, 206.

EASEMENT, continuous, defined, 570.
prescriptive right to, when exists, 570.
EJECTMENT, equitable title, when may be asserted as a defense in, 538.
EMINENT DOMAIN, benefits to land, when may be deducted from damages, 59.
compensation, when necessary to exercise of powers of, 50.
damages, evidence of, what admissible, 51.
damages, when recoverable in, 50.
delegation of right to exercise powers of, 49.
legislature must determine necessity of exercise of powers of, 48.
property not taken, injuries to, 51.
purposes for which powers of, may be exercised, 49.
ESTOPPEL arising when one has represented himself to be a member of a partnership, 757, 758.
EVIDENCE, personal property, value of, how proved, 178.
to prove that one has been held out as a partner, 757, 758.
EXECUTION, death of defendant, levy and sale after, 910.
exemption, farmer may claim, though he has leased his farm, 253.
exemption of horses used in business, 253.
exemption of tools, when includes machinery, 253.
exemption, statutes granting, are liberally construed, 253.
EXECUTORS, fee of property, when vests in, 203.

FIXTURES, test to determine what are, 376.
FRAUD, how must be pleaded, 142.
plea of, when sufficient, 313.
FRAUDULENT CONVEYANCE will not be set aside if debtor has means to satisfy the demands of his creditor, 652.

GUARANTY, death does not terminate contract of, 814.

HABEAS CORPUS, contempt of court, judgment punishing, how far reviewable upon, 422–425.

HABEAS CORPUS, judgments of, to what extent may be reviewable upon, 660.
jurisdiction of the court is all that can be inquired into, 422.
HIGHWAYS, prescriptive right to, is confined to land actually used, 711.
HOMESTEAD, rights in, of wife and children of second marriage, 228.

INDEMNITORS, judgments, when *prima facie* evidence against, 207.
when bound by judgments to which they are not parties, 204–207.
INJUNCTION, against prosecuting action in another state, 184.
to prevent collection of damages, 357.
INSURANCE, agents, declarations of, as evidence, 381.
concealment, when avoids, 382.
health, breach of warranty, what is, 382.
knowledge of agent, when imputed to the insurer, 382.
waiver of proofs of loss, 381.
INTEREST, state, obligation of, to pay on its indebtedness, 643.
statutes granting, do not apply to obligations of state or nation, 643.

JOINT OBLIGORS, death of one of several, effect of, on his liability, 814.
JUDGMENTS based upon service of summons by publication, 402.
complaint is necessary to support, 403.
covenantor against, is bound by, 204.
estoppel against urging invalidity of, 387.
indemnitors, consent judgments are *prima facie* evidence against, 205.
indemnitors, notice to defend makes judgments conclusive against, 206.
indemnitors, when bound by, without notice, 204.
notice to indemnitors to defend actions, 206, 207.
official bonds, sureties upon, when not bound by, against principals, 205.
persons agreeing to become answerable for, 204.
sheriff, judgments against, when conclusive against his indemnitors, 206, 207.
JUDICIAL SALE, confirmation of, and its effect, 187.

LICENSE, injunction to prevent revocation of, 301.
when revocable, 238, 301.
LIEN of mechanic is superior to landlord's lien for rent, 626.
of vendor, assignment of, 279.
of vendor, nature of, 279.
of vendor, waiver of, 279.
LANDLORD AND TENANT, alteration of premises leased, when equivalent to an eviction, 298.
measure of damages for depriving tenant of land, 297.
measure of damages for refusing to make lease, 298.

MANDAMUS against governor, 672.
MARRIAGE, death terminates contract for, 818.
MARRIED WOMEN, reforming conveyances of, 182.
MASTER AND SERVANT, agent contracting as ostensible principal, 508.
agent failing to bind principal, whether binds himself, 511.
agent fully disclosing his authority is not personally liable, 510.
agent is not personally liable when all the facts are known to both parties, 510.
agent of foreign principal, personal liability of, 511.
agent, use of word "agent" will not always relieve him from personal liability, 509.
agent's liability to third persons for acts of misfeasance, 512.

MASTER AND SERVANT, contract of agent made on behalf of his principal, 502.
contractor, when a servant of his employer, 461, 463.
contractor, when not a servant of his employer, 463.
contractor, when a servant of the person employing him, 466.
foreign principal, agent of, whether personally liable, 511.
landlord is not answerable for servants of his tenant, 462.
liability of agent acting without authority, 509.
liability of agent after paying money over to his principal, 512.
liability of agent contracting as principal, 508.
liability of agent for false representations of authority, 508.
liability of master for act of servant, when exists, 459.
misfeasance of agent, liability of, to third persons for, 512, 514.
municipal corporation, principle of *respondeat superior* applies to, 462.
negligence of agents, liability of, to third persons, 513.
newsboy is not a servant of a railway company, 462.
non-feasance of agent, liability of, to third persons for, 512, 514.
one assisting servant in his work, 460.
personal liability of agent, how may be avoided, 509.
pilot, when a servant of the owner of a vessel, 462.
porter of Pullman Car Company, 461.
postal clerk is not a servant of a railway company, 462.
public officer, principle of *respondeat superior*, when applies to, 462, 463.
relation of, continues as long as master retains control or the right to control servant, 459.
relation of, express contract not essential to, 459.
relation of, when ceases, 460.
relation of, when exists, 459–465.
relation of, when one servant employs another, 460.
relation of, where compensation is proportionate to the work done, 460.
respondeat superior, rule of, when applicable, 459.
servant leaving his work may still be in the service of his master, 466.
servant of two or more persons at the same time, 462.
servant undertaking to do work for another than his master, 466.
stevedore, when a servant of the owner of a vessel, 462.
tort, both are liable for, 512.
torts of servants, liability of master for, 465.

MECHANIC'S LIEN, commencement of, 279.

MORTGAGE, deed and defeasance constitute, 724.
equitable, what is, 310.

MORTGAGEE in possession cannot be dispossessed without first paying debt, 320.

MUNICIPAL CORPORATION, exclusive privilege, grant of, by, 797.
gas, grant of exclusive privilege to manufacture and sell, 797.
liability of, for negligence of officers, 98.

NEGLIGENCE, contributory, when a sufficient defense, 906.
on the part of railways and their servants, 906.

PARTNERSHIP, admissions as evidence of, 762.
between corporation and a private person, 759.
burden of proof in action to charge one as a partner, 762.
creditor, when may claim that person is estopped to deny that he is a partner, 757.
commercial agency's reports are not evidence of, 762.

PARTNERSHIP, declarations as evidence of, 762.
dissolution, notice of, when sufficient to relieve retiring partner from further liability, 763.
estoppel to deny that person is a partner, 757, 758.
evidence to prove that one has been held out as a partner, 761.
evidence to rebut charge that one has been held out as a partner, 762.
funds of, should not be used to pay individual debts, 748.
knowledge of one that he is being held out as a partner, 762.
liability of one representing himself to be a partner, 757.
liability of one who suffers himself to be held out as a partner, 757.
liability of person as partner who is not such, what necessary to maintain, 758.
persons acting as partners, liability of, 757.
persons liable as, though they are not partners in fact, 759.
representation that one is a partner cannot operate in favor of creditor who did not act upon it, 758.
reputation as evidence of, 761, 762.
retiring partner, when remains liable, 763.
secret agreement between partners cannot affect their liability to third persons, 760.
suffering one's self to be held out as a partner, 759.
when exists between two or more persons, 761.
PAYMENTS, application of, 67.
POWER OF ATTORNEY given by husband and wife, whether authorizes a conveyance by the husband only, 727.
given by two persons, whether must be restricted to matters in which both are interested, 726, 727.
strict construction of, 726.
PRINCIPAL AND AGENT, acts of agent for his own benefit, 248.
liability of principal for agent's act, 189.
object of creating agency, 508.
power of attorney given by two persons, construction of, 726, 727.
power of attorney given by two persons, whether must be restricted to matters in which they are jointly interested, 726.
public agent disclosing his authority is never personally liable, 510.
public agent, persons dealing with, are presumed to know limits of authority of, 510.
ratification of agent's act, 190.
tort, liability of agent for, 512.
PRINCIPAL AND SURETY, void agreement to extend time of payment does not release surety, 567.
PUBLIC AGENTS, authority of, limitations upon, are presumed to be known to all persons, 510.
personal liability of, 510.

RAILWAYS, fire started by, presumption as to negligence, 590.
freight train, rights of passengers upon, 729.
moving train, conductor's negligence in advising passenger to dismount therefrom, 752.
stock, liability for killing while on its track, 148.
turn-tables, necessity of guarding from children, 174.
RECEIPTS, parol evidence to explain or contradict, 862.

SALE, conditional, loss or destruction of property after, who must bear, 867.
delivery becoming impossible, title may still vest in purchaser, 866, 867.
delivery is not essential to, 866.
destruction of, after conditional sale, right of vendor to recover purchase price notwithstanding, 867, 868.
loss or destruction of property before delivery, who must bear, 866–868.
payment is not essential to, 866.
title, when passes to purchaser, 866.
upon condition, vendor reserving the title, 705.
when becomes complete, 866.
SHELLEY'S CASE, rule of, when applicable, 654.
SPECIFIC PERFORMANCE, land, parol contract for sale of, when enforceable 777.
part performance, sufficiency of, to authorize, 777.
when will be decreed, 238.
STATES, contracts of, and their effects, 649.
interest on obligations of, is not allowed, 648.
SURETYSHIP, death does not terminate contract of, 814.
SURVEYS, controlling courses, which controls, 34.
declarations of parties to establish boundaries, 35.
lost corners, evidence to re-establish, 35.
monuments defined, 34.
parol evidence to locate corners, 34.
quantity of land called for, when may be considered in locating, 35.

TELEGRAPH CORPORATIONS, damages for failure to deliver message, mental suffering as an element of, 896, 897.
mental suffering as an element of damages in action for failing to deliver message, 896, 897.
negligence in failing to deliver message, who may recover for, 639.

USURY, recovery of money paid as, 41.

WATERCOURSE, conveyance of land as bounded by, 291.
title of riparian owners to land bounded by, 291.
when navigable, 291.

INDEX.

ABANDONMENT.

See HIGHWAYS, 2.

ABATEMENT.

PARTY MAKING CONTRACT IS PRESUMED TO INTEND TO BIND HIS EXECUTORS AND ADMINISTRATORS, unless it is of such a nature as to call for some personal quality of the testator, or is so worded as to plainly negative such a presumption. Where, therefore, a testator covenants to rebuild premises leased by him, in case of their destruction by fire, his executor will have power to perform such covenant; and in an action against the executor to recover damages for the breach of such covenant, a motion for a nonsuit on the ground that the executor had no power to rebuild, and no control over the heirs at law to make them rebuild, is properly denied. In such a case, whether the land is devised or descends to the heir, the executor is liable upon the covenant, and must pay the damages, if he have assets. *Chamberlain* v. *Dunlop*, 807.

See SURETYSHIP, 2.

ACCIDENT.

See INSURANCE, 15.

ACCOUNTS STATED.

See BANKS AND BANKING, 8.

ACKNOWLEDGMENT.

See EQUITY, 2.

ACTIONS.

1. LOCAL AND TRANSITORY. — Where a cause of action may arise anywhere, an action thereon is transitory, and when it could have arisen in one place only, the action is local. Hence an action of trespass to the person or for the conversion of goods is transitory, while an action for flooding particular lands is local. *Morris* v. *Missouri Pacific R'y Co.*, 17.
2. LOCAL ACTIONS CONSIST, GENERALLY, of those instituted for the recovery of real estate or for injuries thereto, or for easements. *Id.*
3. LOCAL AND TRANSITORY, BETWEEN NON-RESIDENTS — JURISDICTION. — Where a cause of action between non-residents is partly local and partly transitory, and arose beyond the limits of the state, the court may refuse to entertain jurisdiction, as jurisdiction is entertained in

such cases only upon principles of comity, and not as matter of right. *Id.*

See CORPORATIONS, 14; MALICIOUS PROSECUTION, 1; MILLS AND MILL-DAMS; NEGLIGENCE, 11–13; STATES, 6.

ADVERSE POSSESSION.

1. ADVERSE POSSESSION UNDER MISTAKE IN BOUNDARY. — An entry upon and more than twenty years' subsequent possession of land beyond the line of his own lot by an adjoining owner under claim of title, and under a mistake as to the location of the boundary line, must be deemed adverse to the true owner, so as to extinguish his title and vest it in the party in possession. *Ramsey* v. *Glenny*, 736.

2. PRIVITY REQUISITE BETWEEN SUCCESSIVE HOLDERS, to constitute adverse possession, is, that the latter holder must take under the earlier, as by descent, by will, by grant, or by voluntary transfer of possession. *Id.*

3. CONTINUITY OF POSSESSION BY SUCCESSIVE HOLDERS, HOW EFFECTED. — Continuity and connection of adverse possession by successive holders, so that the possession of the true holder will not intervene, may be effected by any conveyance or understanding which has for its object a transfer of the rights of the possessor or of his possession when accompanied by an actual transfer of the possession. *Id.*

4. ADVERSE ENTRY BY TENANT — ADVERSE POSSESSION BY LANDLORD AND HIS HEIRS OR THEIR GRANTEES. — The connected, successive, and continuous possession of a landlord by his tenant, his heirs and their grantees, to the land in dispute may be tacked together so as to form a continuous and uninterrupted possession adverse to the true owner for the period of time essential to give title by adverse possession. *Id.*

5. ADVERSE ENTRY BY TENANT — ADVERSE POSSESSION BY LANDLORD. — Where an original adverse entry upon and possession of land is made by an adjoining owner's tenant, under a mistake by both as to the location of the boundary line, and this is followed by a new lease of the whole premises to the same tenant, especially mentioning a building previously erected by the tenant on land beyond the true boundary line, the adverse possession of the landlord begins when the tenant entered under the second lease. *Id.*

6. EFFECT OF EXCEPTION IN CONVEYANCES ON ADVERSE CLAIM. — Where a party and his successors in interest, in adverse possession of certain land under a mistake as to the boundary line, make deeds and leases of such land, excepting therein the easterly two feet thereof, previously conveyed, the exception in the deeds and leases cannot be treated as declarations by the parties making them that they made no claim to the land held adversely by mistake, or as conclusive evidence that they did not hold, or claim to hold, adversely to the true owner. *Id.*

7. EFFECT OF ABSENCE OF DISSEISOR FROM STATE. — A party or his successor in interest in adverse possession of land may continue such possession by his tenant, and the absence of the landlord from the state will not interrupt the running of the statute of limitations, as the true owner has his right of action against the tenant to recover possession. *Id.*

AFFIDAVIT.

See JUDGMENTS, 7.

AGENCY.

1. DUTY OF AGENT TO USE REASONABLE CARE IN EXECUTING WORK UNDERTAKEN BY HIM. — Where an agent once actually undertakes and enters upon the execution of a particular work, it is his duty to use reasonable care in the manner of executing it, so as not to cause to third persons any injury which may be the natural consequence of his acts, and he cannot by abandoning its execution midway, and leaving things in a dangerous condition, exempt himself from liability to any person who suffers injury by reason of his having so left them without proper safeguards. *Baird* v. *Shipman*, 504.

2. AGENT'S PERSONAL LIABILITY TO THIRD PERSONS FOR NEGLIGENCE. — An agent of the owner of property who has the complete control and management of the premises, and who is bound to keep them in repair, is liable to a third person for injuries resulting to the latter while using the premises in an ordinary and appropriate manner, through the neglect of such agent to keep the premises in proper repair. And the agent cannot excuse himself on the plea that his principal is liable. It is not his contract with his principal that exposes him to liability to third persons, but his common-law obligation to so use that which he controls as not to injure another. *Id.*

3. POWERS OF ATTORNEY RECEIVE A STRICT INTERPRETATION, and the authority given by them is never extended by intendment or construction beyond that which is given in terms, or absolutely necessary to carry the authority into effect. *Gilbert* v. *How*, 724.

4. JOINT POWER OF ATTORNEY GIVEN BY TWO PERSONS, authorizing another to enter upon, take possession of, and convey all lands in which they may be interested, does not authorize the donee of the power to convey lands in which one only of the donors is interested, and a conveyance made in the name of both is void, unless both had an interest in the lands conveyed. *Id.*

5. APPARENT AUTHORITY OF AGENT. — Where an agent, with express authority to collect, and apparent authority to manage the manner of collection, receives money in payment in lieu of a royalty payable in pulp, his principal is bound by the payment. *Cushman* v. *Somers*, 92.

6. AN AGENT, THOUGH AUTHORIZED TO CONVEY, cannot execute a conveyance to himself and his wife for a nominal consideration. His act is a fraud on his principal, and his conveyance is void. *Winter* v. *McMillan*, 243.

7. PRINCIPAL'S ASSENT NECESSARY TO BIND HIM FOR ACTS OF AGENT OUTSIDE OF APPARENT SCOPE OF HIS AUTHORITY. — The authority of an agent to bind his principal in matters outside of the apparent scope of his authority is not established by proof of the bare fact that he has exercised such authority, unless it is also proved, or the circumstances justify the inference, that the person to be charged as principal assented to such acts. *St. Louis etc. R'y Co.* v. *Bennett*, 187.

8. SCOPE — DECLARATIONS AS TO PAST TRANSACTION. — Where authority is delegated to an agent to transact business, and that business requires continuous negotiations, or is a business not fully ended by a single act, and requires a series of acts to complete it according to the intention of the parties and commercial usages, the authority of the agent does not expire with the performance of one act, although that act may be of prime importance. The rule is the same when the agent has authority to conduct a single transaction; for as to that, he is a general

agent, with authority to perform all acts necessary to fully consummate the transaction. This rule, however, does not permit the declarations of an agent narrating a past transaction to be given in evidence. *Close. land etc. R'y Co.* v. *Closser*, 593.

See CARRIERS, 8, 34; DEEDS, 6; INSURANCE, 2-4; RECEIVERS, 1; WITNESSES, 5.

AMENDMENT.

See PROCESS, 6.

ANIMALS.

1. VICIOUS DOG — REPUTATION AS EVIDENCE OF NOTICE. — Where one keeps upon his premises a dog which has attacked or bitten a considerable number of persons and is notoriously cross and vicious, it may be presumed that the owner has some knowledge of this fact, and in an action to recover for injuries inflicted by such dog, evidence of his general repute for viciousness is admissible, not to prove the particular fact of the dangerous propensity of the animal, but the public notoriety, and as tending to support the inference of knowledge of such propensity on the part of his owner. *Fake* v. *Addicks*, 716.

2. VICIOUS DOG — NOTICE OF VICIOUSNESS. — In an action to recover for an injury received from a vicious dog, the *gravamen* of the action is the neglect of the owner of the animal, known by him to be vicious and liable to attack and injure people, to restrain him so as to prevent the risk of damage, and the notice of such propensity must be such as to put a prudent man on his guard. *Id.*

3. VICIOUS DOG — PROVOCATION BY STEPPING UPON HIM. — Where a person, with full knowledge of the evil propensities and viciousness of a dog, wantonly excites him or voluntarily and unnecessarily puts himself in his way, he cannot recover for an injury; but the fact that the party injured accidentally backed or stepped upon the dog without knowing of his presence is no defense for the owner of the dog. *Id.*

See CARRIERS, 45, 46; JUDGMENTS AND DECREES, 19; RAILROAD COMPANIES, 6, 7.

ANTENUPTIAL CONTRACT.

See WILLS, 1.

APPEAL AND ERROR.

1. AN APPEAL FROM A JUDGMENT and from an order denying a new trial may be taken by one notice by two different parties, though one of such parties appeals from the judgment only, and the notice is sufficient if it states who are appellants and what they appeal from. *Winter* v. *McMillan*, 243.

2. THE FINDING OF FACTS NOT ALLEGED cannot sustain a judgment upon appeal. *Brumbaugh* v. *Richcreek*, 649.

3. JUDGMENTS, PRESUMPTION IN SUPPORT OF. — When there are no conclusions of fact in the record, and the evidence, though conflicting, is sufficient to support the judgment upon some hypothesis, it will be presumed that the judgment was based thereon. *Johnson* v. *Archibald*, 27.

4. PRODUCTION AND USE OF EVIDENCE — PRESUMPTION. — Where instruments of evidence are used in the mode required by law, it cannot be said that there was prejudicial error, although the motion for their production may have been defective, or the order made upon it too broad. In such case it will be presumed on appeal that there was no irregularity or error in the ultimate action of the trial court. *Cleveland etc. R'y Co.* v. *Closser*, 593.

5. PROBATE COURT — JURISDICTION. — When the probate court has no jurisdiction of the subject-matter of an action, the higher courts can get no jurisdiction on appeal. *Stewart* v. *Lohr*, 150.

6. REVERSAL OF VOID JUDGMENT. — On motion to dismiss an appeal from a judgment, void for want of jurisdiction, the supreme court may order the judgment of the lower court reversed for the purpose of clearing the record. *Id.*

7. JUDGMENT SATISFIED CANNOT BE REVIEWED UPON APPEAL. Hence if persons to whom an estate was distributed by a decree of court have received and receipted for their full share so distributed to them, they cannot appeal from such decree, and any appeal which they may attempt to prosecute may be dismissed upon motion. *Estate of Baby*, 239.

8. WHERE THE LOWER COURT has not abused its discretion in refusing a new trial on the ground of excessive damages, the judgment will not be disturbed. *Olson* v. *St. Paul etc. R. R. Co.*, 749.

9. FINDINGS. — IF A COURT DECLINES TO FIND upon certain issues, on the ground that they are not material, the appellate court will presume that evidence was offered thereupon, and will reverse the judgment if, in its opinion, the issues were material. *Spect* v. *Spect*, 314.

10. WHERE CHARGE AS A WHOLE IS CORRECT the judgment will not be reversed, although an extract from the charge, taken by itself, is erroneous. *Cushman* v. *Somers*, 92.

11. HARMLESS ERROR. — Where a witness was asked what a leasehold was worth to him, an allowance of such question is a harmless error, if the answer of the witness shows that the only value to which he testifies is the market value. *Hawthorne* v. *Siegel*, 291.

See CRIMINAL LAW, 7–9; DAMAGES, 4; JUDGMENTS, 9; TRIAL, 8.

APPROPRIATIONS.

1. APPROPRIATION. — PROMISE TO PAY A DEBT OF A STATE, contained in a certificate thereof issued by its authority, is not an appropriation. *Carr* v. *State*, 624.

2. APPROPRIATION NEED NOT BE MADE IN EXPRESS TERMS. It is sufficient that an intention to make it is clearly evinced by the language of the statute, or that no effect can be given to the statute unless it is considered as making the necessary appropriation. *Id.*

3. APPROPRIATION FOR PAYMENT OF SALARY. — If the salary of a public officer is fixed and the times of payment prescribed by law, no special appropriation is necessary to authorize the issuing of a warrant for its payment. *Id.*

4. APPROPRIATION. — IF A STATUTE SETS APART THE MONEYS IN THE STATE DEBT SINKING FUND for the payment of the principal of certain indebtedness of the state, this is a valid appropriation; and if that statute is afterwards abrogated by another statute, declaring that the state sinking fund shall be discontinued, merged in, and constitute part of the

general fund, and all sums of money payable out of the state sinking fund shall be payable out of the general fund of the state treasury, this latter statute is also an appropriation. *Id.*

See CONTRACTS, 2; INTEREST, 5.

ASSAULT.

EVIDENCE — PROVOCATION — MITIGATION OF DAMAGES. — A defendant cannot give in evidence, in mitigation of damages for an assault, the acts and declarations of the plaintiff at a different time, or any antecedent facts which are not fairly to be considered as part of one and the same transaction. To entitle the defendant to give evidence of provocation in mitigation of damages, the provocation must be so recent and immediate as to induce a presumption that the violence done was committed under the immediate influence of the feelings and passions excited by it. *Millard* v. *Truax*, 705.

ASSIGNMENT.

ASSIGNMENT OF RECOGNIZANCE. — A party entitled to a share or the whole of a recognizance cannot assign it so as to defeat any legal or equitable defense to which it was subject in the hands of the assignor. *Burton* v. *Willis*, 363.

See BANKS AND BANKING, 17, 19.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

See BANKS AND BANKING, 6, 7.

ASSUMPTION.

See GIFTS, 2.

ATTACHMENT AND GARNISHMENT.

1. ATTACHMENT AGAINST NON-RESIDENT. — A non-resident's property is attachable when his residence is not such as to subject him personally to the jurisdiction of the court, and thus place him upon equality with the other residents of the state. *Carden* v. *Carden*, 876.
2. ATTACHMENT AGAINST NON-RESIDENT. — Where one voluntarily removes from one state to another for the purpose of discharging the duties of an office of indefinite duration, which requires his continued presence there for an unlimited time, he becomes a non-resident of the former state for the purposes of attachment, although he may occasionally visit that state, and entertain an intent to return and reside there at some uncertain time. *Id.*
3. MONEY CEASES TO BE HELD IN CUSTODY OF LAW when the court makes an order for its distribution to the parties whom it finds entitled thereto, and directs its officer to pay such moneys to them. *Dunsmoor* v. *Furstenfeldt*, 331.
4. GARNISHMENT OF A RECEIVER OR OTHER OFFICER OF A COURT IS EFFECTIVE WHEN the moneys in his hands have been distributed by the court and directed to be paid in specified sums to the several parties entitled thereto, and the garnishment is of the interest of one of such parties. *Id.*
5. DEBT, WHAT IS. — IF MONEYS IN CUSTODY OF LAW ARE DISTRIBUTED by an order of court, and a definite sum is directed to be paid by the clerk or other officer having possession thereof to a person designated, such

officer must be regarded as owing a debt to such person, within the meaning of the law authorizing the garnishment of any person owing debts to the defendant. *Id.*

6. ATTACHMENT OF DEBTOR'S PROPERTY NOT ENJOINED WHEN. — When a debtor and his creditor are domiciled in different states, and the creditor in the courts of his own domicile proceeds to attach the property of the debtor which is exempt by the law of the latter's domicile, the courts of the debtor's domicile will not enjoin the creditor from proceeding, even though he is temporarily found within their jurisdiction; and if in such a case an injunction is improvidently granted, and the creditor violates it by taking judgment in a court of his domicile, and appropriating to its payment the property attached, the court that issued the injunction will not render judgment against the creditor for the value of the property so appropriated. *Griffith* v. *Langedale*, 182.

See CARRIERS, 41; CHATTEL MORTGAGES, 5.

ATTORNEYS.

See CRIMINAL LAW, 6.

ATTORNEYS' FEES.

See CARRIERS, 40.

BANKS AND BANKING.

1. RELATION BETWEEN BANK AND DEPOSITOR THAT OF DEBTOR AND CREDITOR. — Deposits of money made by a depositor with a bank create between them the relation of debtor and creditor, and the law implies a contract on the part of the bank to disburse the money standing to the depositor's credit only upon his order and in conformity with his directions. *Shipman* v. *Bank of State*, 821.

2. RELATION BETWEEN BANK AND DEPOSITOR is that of debtor and creditor, and has none of the elements of a trust about it. The bank does not assume to become a fiduciary as to the money deposited, nor does it agree to hold it in trust for the depositor. *Hawes* v. *Blackwell*, 870.

3. RELATION BETWEEN BANK AND DEPOSITOR. — A depositor, when he makes a deposit, becomes a creditor of the bank, and the latter becomes his debtor, for the amount of money deposited, agreeing to discharge the debt so created by honoring and paying the checks or orders drawn upon it by the depositor, when presented, not exceeding the amount deposited. *Id.*

4. DEPOSIT. — When a bank, in the course of business, receives deposits of money, in the absence of any agreement to the contrary, it at once becomes the money of the bank as part of its general funds, and can be used by it for any purpose for which it may use money otherwise acquired. *Id.*

5. BANK CANNOT CHARGE DEPOSITOR WITH PAYMENTS MADE WITHOUT HIS DIRECTION. — A bank is not entitled to charge against its depositor's account any sums as payments, unless they have been made to such persons as he directed. Payments of the depositor's funds made by the bank without his order afford to it no protection when called upon by him to account for the money deposited. *Shipman* v. *Bank of State*, 821.

6. DEPOSIT — ASSIGNMENT OF, BY BANK. — The money of a general depositor in a bank is the property of the bank, and subject to assignment by it for the benefit of creditors. *Hawes* v. *Blackwell*, 870.

7. ASSIGNMENT OF DEPOSIT — RIGHT OF CHECK-HOLDER. — The holder of a check drawn before, and presented for payment after, an assignment by the bank for the benefit of creditors is not entitled to the amount thereof as against the assignee. He is only entitled, as against him, to his *pro rata* share of the fund remaining after the payment of preferred creditors, while as against the drawer he is entitled to have so much of his deposit as is named in the check set apart for its payment, subject to the rights of the bank and its assignee. *Id.*

6. ACCOUNT STATED BY BANK TO ITS DEPOSITOR MAY BE OPENED UPON PROOF OF FRAUD OR MISTAKE. — An account stated by a bank to its depositor, by its balancing and returning to him his pass-book, with the vouchers, can always be opened upon proof of mistake or fraud, unless the depositor is chargeable with negligence. The only effect of the silence of the depositor as to the correctness of the account rendered by the bank is to put upon him the burden of showing that the account, as stated, was the result of fraud or mistake. *Shipman* v. *Bank of State*, 321.

9. EQUITABLE DEFENSE UNAVAILABLE WHEN. — In an action against a bank, brought by a depositor to recover money deposited with it, part of which it had paid out on checks upon which a clerk of the plaintiff had forged the indorsements of the payees, it appeared that said clerk had made good to the payees the amounts of such checks, and the defendant set up this fact as a partial equitable defense, but as it did not appear with what funds or in what manner said clerk made such payments, nor that they were made at the expense or to the injury of the defendant, nor that the plaintiff profited by them, and as it did appear that the plaintiff had paid, on account of the frauds of said clerk, more than the amount of these checks, it was held that a refusal to charge that the plaintiff, not having sustained any loss by reason of such checks, was not entitled to recover upon them was not error. *Id.*

10. PAYMENTS UPON FORGED INDORSEMENTS DO NOT EXONERATE BANK WHERE DEPOSITOR NOT CHARGEABLE WITH NEGLIGENCE. — Payments made by a bank upon forged indorsements are at its peril, unless it can claim protection upon some principle of estoppel, or by reason of some negligence chargeable to the depositor. *Id.*

11. CHECK MADE PAYABLE TO ORDER OF FICTITIOUS PERSON NOT IN EFFECT PAYABLE TO BEARER WHEN. — The rule that a negotiable instrument made payable to the order of a fictitious person and negotiated by the maker has the same validity, as against the maker and all persons having knowledge of the facts, as if payable to bearer, applies only to paper put into circulation by the maker with knowledge that the name of the payee does not represent a real person. Such paper cannot be treated as payable to bearer unless the maker knows the payee to be fictitious, and actually intends to make it payable to a fictitious person. *Id.*

12. DRAWER OF CHECK IS NOT PRESUMED TO KNOW SIGNATURE OF PAYEE. — The drawer of a bank check is not presumed to know the signature of the payee. The bank must, at its peril, determine that question. When, therefore, a bank returns to its depositor a check, as evidence of a payment made by his direction, he has the right to assume that the bank has ascertained the indorsement upon it to be genuine. *Id.*

13. PAYMENT OF CHECK AT RISK OF BANK. — Banks are required, and for their own safety are compelled, to know at all times the balance to the credit of each individual customer, and they accept and pay checks at

their own risk and peril. If, from negligence or inattention to their own affairs, banks improvidently pay when the account of the customer is not in condition to warrant it, and if by mistake a check is paid when the drawer has no funds in bank, it must look to the customer for rectification, and not the party to whom the check was paid. *First Nat. Bank* v. *Devenish*, 394.

14. MISTAKE IN PAYMENT OF CHECK. — A mistake by one, which is the direct result of his own carelessness and inattention to his own affairs, affords no ground for relief at law or in equity; and a mistake as to the state of a customer's bank account affords no ground of relief for the payment of his check as against the payee, in the absence of an authorized agreement on his part to return the draft received in payment. *Id.*

15. PAYMENT OF CHECK BY MISTAKE — ALLEGATION AND PROOF — VARIANCE. — An allegation that a bank paid the check of a customer under mistake of fact as to the state of his account is not supported by proof that it held a check drawn in his favor, and falsely represented by him to be good at the time of making such payment, as against the party who received a draft from the bank in payment of the check. *Id.*

16. REMEDY OF CHECK-HOLDER. — The drawer of a check agrees that it will be paid by the bank when duly presented for payment, and upon refusal by the bank to pay, the holder has his remedy against the drawer for his breach of contract. *Hawes* v. *Blackwell*, 870.

17. RIGHTS OF CHECK-HOLDER. — A check, as to the drawer thereof, is an assignment to the holder of the deposit to the amount specified in the check, but it does not create a lien as against the bank. The holder simply has an interest in the deposit, subject to the bank's right of set-off against the depositor, and to pay his outstanding checks received and paid before notice. *Id.*

18. RIGHTS OF CHECK-HOLDER OR PAYEE. — The payee or holder of a check for part of a deposit cannot, in the absence of ground for equitable relief, maintain his separate action against the bank for non-payment on presentation, until the bank has accepted the check or agreed to pay it. He, however, has his remedy against the drawer, or they may jointly recover against the bank, subject to its rights of set-off against the depositor, and to pay all his outstanding checks of which it has notice before such check is presented. *Id.*

19. RIGHTS OF CHECK-HOLDER. — A check for the whole of a deposit is an assignment of the depositor's whole debt against the bank, and entitles the holder to maintain his separate action therefor against the bank upon presentation of the check and refusal of payment, subject to the bank's right of set-off against the depositor, and to pay his outstanding checks received and paid before notice. *Id.*

See FRAUD, 6.

BAWDY-HOUSE.

See CRIMINAL LAW, 11.

BILLS OF LADING.

See CARRIERS, 42–44.

BONA FIDE PURCHASERS.

See FRAUDULENT CONVEYANCES, 4–6.

BONDS.

See INTEREST; SURETYSHIP, 1.

BOUNDARIES.

1. SURVEY, EVIDENCE TO VARY OR ESTABLISH CALLS IN. — When the calls in a grant, if applied to the land, correspond with each other, parol evidence is not admissible to vary them by showing that they are not the calls in the survey as actually made. If, when so applied, they disclose a latent ambiguity, and conflict with one another, parol evidence may be resorted to for the purpose of determining the conflict, and showing the land actually intended to be embraced by the calls of the survey. *Johnson* v. *Archibald*, 27.
2. WHAT CALLS PREVAIL. — Calls in a survey for natural objects or marked lines and corners prevail over calls for course and distance. *Id.*
3. SURVEY, EVIDENCE TO SHOW. — The survey as actually made may always be shown by any legal evidence, when in fact the lines were run upon the ground. *Id.*
4. CALL FOR COURSE AND DISTANCE PREVAILS OVER MISTAKEN CALL FOR OBJECT. — Whenever the evidence is sufficient to induce the belief that the mistake in a survey is in the call for a natural or artificial object, and not in the call for course and distance, the latter will prevail, and the former will be disregarded. *Id.*
5. EVIDENCE OF MISTAKE IN CALL. — The declaration of the surveyor who made the survey is competent evidence to show that the mistake therein is in the call for a natural object, and not in the call for course and distance. *Id.*

See ADVERSE POSSESSION, 1, 6.

BURDEN OF PROOF.

See BANKS AND BANKING, 8; CARRIERS, 7, 28; FRAUDULENT CONVEYANCES, 6; VENDOR AND PURCHASER, 6.

BURGLARY.

See CRIMINAL LAW, 10.

CARRIERS.

1. RIGHT TO CONTROL DEPOT GROUNDS — UNJUST DISCRIMINATION. — A railroad company can make all needful reasonable rules and regulations concerning the use of its depot and grounds, and may exclude all persons therefrom who have no business with the railroad or the passengers going to or coming from the trains or depot, and prohibit all persons from soliciting business for themselves upon its premises; but it cannot arbitrarily admit one carrier of passengers or freight to its depot or grounds, to the exclusion of all others, for no other reason than that it is for its own pleasure or profit so to do. *Kalamazoo H. & B. Co.* v. *Sootsma*, 693.
2. RIGHT TO DISCRIMINATE BETWEEN HACKMEN. — A railroad company cannot, upon any pretense, except of wrong or misconduct on the part of the person excluded, grant to one hackman, or line of hacks and omnibuses, the exclusive right to occupy a place upon its depot grounds, nor can it set aside the most favorable part of such grounds to a hack and omnibus company engaged in carrying passengers and freight, to the exclusion of others engaged in the same business. A grant of such

privilege is an unjust discrimination, tending to defeat competition and to create a monopoly. *Id.*

3. CARE REQUIRED BY RAILWAY TOWARDS PASSENGERS is the highest practicable care, caution, and diligence which capable and faithful railroad men would exercise under similar circumstances. *Furnish* v. *Missouri P. R'y Co.*, 781.

4. LIABILITY FOR SLIGHT NEGLIGENCE. — A carrier of passengers by railway is liable for injury resulting from slight negligence on its part. *Id.*

5. CARE REQUIRED OF. — A carrier of passengers by railway is bound to furnish reasonably safe and sufficient road-bed, tracks, cars, and engines, so far as the utmost human skill, diligence, and foresight can provide, and this means such skill, diligence, and foresight as is exercised by a very cautious person under like circumstances. *Id.*

6. LIABILITY FOR DEFECT IN ROADWAY. — A carrier of passengers by railway is liable for a failure to discover a defect in its road-bed or roadway which could have been discovered by a proper discharge of its duty of inspection in time to avert an accident. *Id.*

7. PRIMA FACIE CASE OF INJURY — BURDEN OF PROOF. — A passenger by railway makes a *prima facie* case of negligence against the company by showing the facts of the derailment of the cars and his injury. The burden of proof then rests on the company to show that it has not been negligent. *Id*

8. LIABILITY ON CONTRACT OF AGENT. — Where the agent of the receiver of a railroad sells a ticket to an applicant, which is good only on a special excursion train in charge of a third person, whose name is attached to the ticket purchased, but of whose contract with the carrier the purchaser is ignorant, a binding contract for transportation according to the terms of the ticket exists between the carrier and such purchaser. *Eddy* v. *Harris*, 88.

9. DUTY AS TO PURCHASE OF TICKET. — A person purchasing a railway ticket has a right to rely upon the agent of the company to give him a proper ticket, when called and paid for; and no peculiar circumstances intervening, there is no duty upon the purchaser to examine the ticket, and any mistake which may occur is chargeable to the railroad company, and not to the purchaser or receiver of the ticket. The company may be compelled to respond in damages for its mistake. *Georgia R. R. etc. Co.* v. *Dougherty*, 499.

10. RIGHTS OF PASSENGER. — A passenger who has paid for and supplied himself with a ticket in all respects valid and regular, boarded the proper train, conducted himself in a proper manner, and surrendered his ticket to the company at its request, cannot be required either to produce the ticket when again called upon for it, or to pay fare as a condition of remaining upon the train and being carried to his terminus as indicated upon his ticket; nor does he lose any of his rights by any mistake made by the conductor in reading the ticket, construing it, mingling it with other tickets, or otherwise disposing of it. *Georgia R. R. etc. Co.* v. *Eskew*, 490.

11. DAMAGES FOR BREACH OF CONTRACT OF CARRIAGE. — Where the failure of the carrier to transport a passenger according to the terms of the contract, as shown by the ticket purchased, only results in the loss of one day's time, the passenger can only recover for such loss of time, together with the amount paid for the ticket, and interest thereon. *Eddy* v. *Harris*, 88.

12. POSTAL-CLERK ENTITLED TO RIGHTS OF PASSENGER. — A postal-clerk on board a railway train by virtue of a contract made with the United States government for the transportation of the mails and of postal-clerks is entitled to all the rights of a passenger in case of injury to him arising from the negligence of the company. Privity of contract is not essential to the liability of the carrier for such injury. *Magoffin* v. *Missouri P. R'y Co.*, 798.

13. PARTY ON FREIGHT TRAIN NOT PAYING FARE, WHEN ENTITLED TO RIGHTS OF PASSENGER. — Where the conductor of a train disobeys the rules of the company for which he is acting, in regard to the collection of fare from a passenger, and permits him to be upon a forbidden part of the train, or upon a train not allowed to carry passengers, the traveler has all the rights of a passenger, if without notice, express or implied, of the rules or of the conductor's disobedience. *McVeety* v. *St. Paul etc. R'y Co.*, 728.

14. PARTY ON TRAIN NOT PAYING FARE, WHEN NOT ENTITLED TO RIGHTS OF PASSENGER. — Where a person solicits and secures free transportation, or rides upon a part of the train from which passengers are excluded, or takes passage upon a train not allowed to carry passengers, knowing that his act is against the rules of the company, and that in permitting it the conductor is disobedient, he is guilty of a fraud, and not entitled to a passenger's rights to recover for injury. *Id.*

15. BOARDING MOVING TRAIN WITH SANCTION OF CONDUCTOR. — When a passenger having charge of live-stock in a car attempts to enter it with the consent of the conductor, and upon his assurance that it is safe to do so before the train moves, and is injured by the sudden starting of the train with a jerk while in the act of entering the car, the company is liable. *Olson* v. *St. Paul etc. R. R. Co.*, 749.

16. EXPULSION OF PASSENGER — SALE OF WRONG TICKET — DAMAGES. — Where a railroad ticket-agent sells the wrong ticket to a person who has asked for and believes that he has received the right ticket, and who, having no money to pay an additional fare, is afterwards ejected from the train by the conductor, under protest, after explaining to him the circumstances of the case and of the purchase of the ticket he is entitled to recover vindictive as well as compensatory damages of the railroad company. The amount of such recovery must be governed by the circumstances of each particular case. *Georgia R. R. etc. Co.* v. *Dougherty*, 499.

17. EXPULSION OF PASSENGER. — A passenger, whether right or wrong in any contention or misunderstanding with a conductor, is under no duty, either legal or moral, to remain on the train until the conductor appeals to force for the execution of his commands in expelling him. If the passenger obeys the command to leave the train, and thereby does an act to which his own will does not consent, he is coerced. *Georgia R. R. etc. Co.* v. *Eshew*, 490.

18. EXPULSION OF PASSENGER. — While a passenger cannot avail himself of a formal order of the conductor to quit the train, not meant to be absolute and final, as a pretext for leaving the train and grounding an action against the company for expulsion, yet, where the circumstances fairly warrant him in believing that the conductor means what he says, and he really believes it, he need not wait for the employment of actual force against him, but may submit to the moral coercion of the conductor's authority, and abandon the train as an expelled passenger. *Id.*

19. EXPULSION OF PASSENGER — EVIDENCE OF INTENT. — In an action by a passenger to recover for expulsion from a train, evidence that the conductor remained silent after the passenger remarked in his hearing, upon alighting from the train, "that it was hard to be put off and be compelled to pay one's fare," is admissible, and should be considered by the jury in arriving at a determination as to whether or not it was the intent of the conductor to eject the passenger. *Id.*

20. EXPULSION OF PASSENGER — EVIDENCE OF INTENT. — In an action by a passenger to recover for expulsion from a train, evidence as to whether or not it was the intent of the conductor to expel him is admissible, as affecting the question of punitive damages, and the conductor may testify as to his intent. *Id.*

21. EXPULSION OF PASSENGER — MEASURE OF DAMAGES. — A person upon whom a wrong has been committed is bound to lighten the damages as much as he can by the use of ordinary care and diligence, and as to the extent in which his damages are increased by his failure to observe such care and diligence, they are the result of his own negligence. This rule applies to a passenger expelled from a train, in considering the time and mode of traveling from the place of his expulsion to the station to which he is entitled to ride. *Id.*

22. EXPULSION OF PASSENGER — MEASURE OF DAMAGES. — Whether or not a common carrier shall pay more or less damages for expelling a passenger and failing to carry him to a certain station does not depend on what occurs to the passenger after he passes such station. The carrier need only make him whole for what he has lost by delay and otherwise up to the time of his reaching such station. *Id.*

23. EXPULSION OF PASSENGER — MEASURE OF DAMAGES. — In an action by a passenger to recover for expulsion from a train, compensation for his inconvenience, physical hardship, and injury to health from the time he was expelled until he arrived at the station to which he was entitled to ride, or incurred thereafter, should be denied altogether, if they were needlessly incurred. *Id.*

24. EXPULSION OF PASSENGER. — PUNITIVE DAMAGES may be awarded for the unlawful expulsion of a passenger from a train, but they should be graduated with reference to the special circumstances of each case. *Id.*

25. EXPULSION OF PASSENGER. — COMPENSATION FOR WOUNDED FEELINGS, in an action by a passenger to recover for expulsion from a train, must be determined by the jury, under the circumstances of each particular case. *Id.*

26. EXPULSION OF PASSENGER — EXCESSIVE DAMAGES. — In an action by a passenger to recover for expulsion from a train, a verdict for $750 would seem to be excessive, in the absence of proof of any willful or intentional violation of the passenger's rights on the part of the conductor, although the latter was negligent and in error. *Id.*

27. ILLEGAL COMBINATION STIFLING COMPETITION — RIGHT TO MAKE SPECIAL CONTRACT WITH SHIPPER. — A contract between competing carriers forming a combination or "pool" for the purpose of preventing or stifling competition is illegal and void, and a contract between one of the associated carriers and a shipper, stipulating for a special rate, and containing no element of partiality, oppression, or improper favoritism, is valid and enforceable. *Cleveland etc. R'y Co.* v. *Closser*, 593.

28. COMBINATION TO STIFLE COMPETITION — BURDEN OF PROOF. — A combination between common carriers to prevent competition is *prima*

facie illegal, and the burden of proof is on the carrier to remove the presumption by affirmative proof that the object of the combination was only to prevent ruinous competition, and that it does not establish unreasonable rates, unjust discriminations, or oppressive regulations. Until the presumption is thus removed, the combination must be held to be within the condemnation directed against all contracts which violate public policy. *Id.*

29. VALIDITY OF CONTRACT DISCRIMINATING IN FAVOR OF ONE SHIPPER. — A mere discrimination will not invalidate a contract between a carrier and a shipper. To have that effect, other elements must enter into the contract, and when such elements are present in such force as to make the discrimination unjust or oppressive, the contract will be illegal. Whether or not the contract is impartial depends upon the circumstances of each particular case. *Id.*

30. SPECIAL CONTRACT WITH SHIPPER — VALIDITY OF. — A contract binding a carrier to transport as many car-loads of grain as the shipper may desire transported is not illegal and ineffective for the reason that the shipper is under no obligation to ship any definite or designated quantity of grain. When acts are done in performance of the contract, it is valid as to those acts, although the contract may be revocable, for until there is an effective revocation the contract remains in force. *Id.*

31. VALIDITY OF CONTRACT FOR REBATE TO SHIPPER. — A contract between a common carrier and a grain shipper, by which the carrier agrees to receive at the time of shipment a designated sum as compensation for the transportation of grain, and to refund a certain part of the sum received when the transportation is completed, is valid and binding. *Id.*

32. SPECIAL CONTRACT WITH SHIPPER — RIGHT TO REBATE. — Where a common carrier makes a special contract with a shipper to repay part of the sum received, he must perform his part of the contract, unless he overthrows the presumption of fairness and right by countervailing facts. The shipper need not first prove that the rate charged and paid under the contract was excessive and unjust, as his right to recover rests upon the contract stipulating for a rebate. *Id.*

33. VALIDITY OF CONTRACT FOR REBATE TO SHIPPER. — To give an illegal character to a contract between a common carrier and a shipper by which the latter is to receive a rebate on freight charged when the transit is ended, more must be shown than the mere fact that the parties stipulated for a rebate, as it cannot be presumed that fraud was intended or practiced, nor that there was any wrongful combination to secure an undue advantage over other shippers, nor that in stipulating for a rebate the carrier intended to make, in favor of a particular shipper, a discrimination forbidden by law. *Id.*

34. SPECIAL CONTRACT WITH SHIPPER — WAIVER BY AGENT. — Where, under a special contract between a carrier and a shipper, it appears that the contracting shipper was first prohibited from claiming a rebate on grain consigned by him to a certain third party, and that subsequently thereto an authorized agent of the company entered into a contract as to rebates with the shipper, treating the former interdiction as withdrawn and ineffective, and inducing the shipper to believe that it had no force, he is entitled to rebates on grain subsequently shipped by him to such third party. *Id.*

35. ACT OF GOD — PROXIMATE CAUSE — NEGLIGENCE. — A gale of wind of such violence as to make it impossible for a person to stand or walk

at the time an express-car is derailed by it, and thrown into such position that the express packages therein are piled in one corner at the top of the car, after which it is so quickly consumed by fire set by a stove or lamp therein that the express-messenger only escapes with difficulty, is such act of God and proximate cause of the loss of an express package contained in the car as will excuse the railroad company from liability for the loss, or for negligence in failing to protect and secure the goods in the burning car. *Blythe* v. *Denver etc. R'y Co.*, 403.

36. PROXIMATE AND RESULTING CAUSE. — When the immediate resulting cause of loss by a carrier is fire caused by the overturning of a car by a violent wind, an instruction that "where one is pursuing a lawful vocation in a lawful manner, and something occurs which no human skill or precaution could foresee or prevent, and as a consequence the accident takes place, this is called 'inevitable accident,' or the 'act of God,'" is not prejudicial, although not technically correct. *Id.*

37. LIABILITY FOR GOODS NEGLIGENTLY HELD AND LOST AFTER ARRIVAL. — Where goods are directed to be shipped to a certain point, and instead of sending them direct, the carrier transports them in a roundabout way, thereby causing a delay of eight days in their arrival, and two days subsequent thereto they are destroyed by flood, the carrier is liable for their loss, especially when the consignee has made daily demands for the goods at the point of destination from the day when they should have arrived up to the day of loss. *Richmond etc. R. R. Co.* v. *Benson*, 446.

38. CONTRACT OF CARRIAGE, WHEN WILL NOT EXCUSE LIABILITY. — When goods marked with a certain number have arrived at their destination, and are afterwards lost by flood while in the hands of the carrier, and after they have been demanded by the consignee upon his bill of lading for goods marked with the same number, a contract of carriage with the shipper exempting the carrier from liability for "wrong carriage or wrong delivery of goods marked with initials, numbers, or imperfectly marked" will not excuse the carrier for liability for the loss. *Id.*

39. POWER TO LIMIT LIABILITY FOR LOSS. — A stipulation in the contract of carriage limiting the liability to the carrier by whom the damage is occasioned is valid and binding as to connecting carriers, and proof by a carrier that damage did not occur while the goods were in its charge exonerates it from liability. *Texas etc. R'y Co.* v. *Adams*, 56.

40. NEGLIGENCE — LIABILITY FOR COUNSEL FEES. — In an action against a common carrier for loss of goods through negligence, he is not liable for counsel fees in addition to actual damages, in the absence of evidence that he has acted in bad faith or has been stubbornly litigious for the purpose of putting the plaintiff to unnecessary expense. *Richmond etc. R. R. Co.* v. *Benson*, 446.

41. ATTACHMENT OF GOODS IN TRANSIT — RIGHT OF CARRIER TO HOLD GOODS. — In an action against a common carrier to recover for taking goods which he has in transit from the possession of a sheriff who has levied upon them under a writ of attachment, it is a good defense that the property sought to be attached was not the property of the party against whom the writ of attachment issued, nor subject to levy and attachment against him. *Simpson* v. *Dufour*, 590.

42. BILLS OF LADING CONCLUSIVE AS TO QUANTITY OF GOODS RECEIVED WHEN. — Where a carrier executes and delivers to a consignor bills of lading,

acknowledging the receipt on board his vessel of a certain number of bushels of wheat to be transported to a certain place and there delivered to a consignee, subject to a certain charge for freight, and such bills of lading contain the provision, "All the deficiency in cargo to be paid by the carrier and deducted from the freight, and any excess in the cargo to be paid for to the carrier by the consignee," the carrier must account for the precise quantity of wheat acknowledged in the bills of lading, and no other evidence on that point can be received. If, in such case, there be any deficiency in the quantity of wheat receipted for, the value of the deficiency must be deducted from the stipulated freight, and the difference is all that the consignee, who is but the agent of the consignor, can be held liable to pay. *Rhodes* v. *Newhall*, 359.

42. BILL OF LADING IS ADMISSIBLE IN EVIDENCE, if otherwise sufficiently proved to exist, without proof of its execution, or of the signature thereto, or of the agency of the person purporting to have signed it. *Richmond etc. R. R. Co.* v. *Benson*, 446.

44. RULE REQUIRING NOTICE OF LOSS — REASONABLENESS OF QUESTION FOR JURY. — Whether or not a stipulation in a bill of lading, that "claims for loss or damages must be presented to the delivering line within thirty-six hours after the arrival of the freight," is reasonable is a question for the jury, under all the circumstances of the case. *Texas etc. R'y Co.* v. *Adams*, 56.

45. LIABILITY FOR NEGLIGENCE IN CARRIAGE OF LIVE-STOCK. — Under section 4386, United States Revised Statutes, relating to the carriage of live-stock by common carriers, it is negligence *per se* for a railroad company to keep live-stock upon its cars for more than twenty-eight consecutive hours without unloading them for rest, water, and feeding; and the company is liable not only for the penalty prescribed in the statute, but also for all damages or injury that may thereby be sustained by the owner of the stock. *Nashville etc. R'y Co.* v. *Heggie*, 453.

46. LIABILITY FOR NEGLIGENCE IN CARRIAGE OF LIVE-STOCK. — In an action against a railroad for negligence and non-compliance with the statute in transporting live-stock, by keeping them confined in the cars for more than twenty-eight consecutive hours, the fact that the company's stock-yard at its feeding-station was on fire upon the arrival of the train will not excuse it for not furnishing the person in charge of the stock all proper facilities for caring for them, in compliance with the contract of shipment, nor for failing to stop the train at some other station, so that the stock, after they had been on the cars more than twenty-eight consecutive hours, might be unloaded, watered, and fed by the person in charge, notwithstanding his want of diligence in not urging that the train be so stopped for that purpose. *Id.*

47. CONNECTING LINES — PRESUMPTION AS TO WHERE LOSS OCCURRED. — Where goods have been transported by successive carriers, and damaged subsequently to shipment, it is presumed, in the absence of evidence, that the damage was caused by the last carrier; but he may overcome this presumption by evidence to the contrary. *Texas etc. R'y Co.* v. *Adams*, 56.

CHARACTER.

See CRIMINAL LAW, 3-6.

CHATTEL MORTGAGES.

1. SUFFICIENCY OF DESCRIPTION. — A chattel mortgage of "three cows" or of "five cows," the mortgagor having at least six cows at the time that

the mortgage was given, or of "two cows delivered to me by" a certain person, the mortgagor having at that time five cows delivered to him by the same person, is void for indefiniteness of description. *Parker* v. *Chase*, 99.

2. SUFFICIENCY OF DESCRIPTION. — While the description of property enumerated in a chattel mortgage need not be sufficiently definite to enable one to find the property without inquiry, in order to make the mortgage valid it must be such as to indicate the line of inquiry and furnish the basis of identification. The instrument must contain some designation which, when aided by further information, will determine what property is mortgaged. The number of articles may be sufficient if the mortgagor owns no more than the number given; but the mere statement of a number, when the mortgagor owns a larger number, in no way designates the property, and renders the mortgage void for indefiniteness. *Id.*

3. SUFFICIENCY OF DESCRIPTION. — A chattel mortgage which leaves the designation of the specific property mentioned therein resting exclusively in the minds of the parties fails to meet the purposes and requirements of the law, and is void for indefiniteness. *Id.*

4. RECORD AS NOTICE. — The recording of a chattel mortgage in one state has no extraterritorial force in another state as notice of a lien. *Corbett* v. *Littlefield*, 681.

5. REMOVAL TO ANOTHER STATE of mortgaged chattels by the mortgagor in whose possession they were left subjects them to attachment by his creditors in the state to which they were removed, though the mortgage was duly recorded in the state where it was given, and the chattels were removed without the mortgagee's knowledge or consent. *Id.*

6. LIEN ON AFTER-ACQUIRED PROPERTY — STOPPAGE IN TRANSIT. — A chattel mortgage covering additions to and substitutes for the mortgaged property will not constitute a lien on goods ordered by the mortgagor before the execution of the mortgage, and which were never actually delivered to him as owner, nor will the seller's right of stoppage in transit, in case of the insolvency of the mortgagor, be divested by a purchase of the goods so ordered, by the mortgagee at the mortgage sale. *Kingman* v. *Denison*, 711.

CHECKS.

See BANKS AND BANKING.

CLOUD ON TITLE.

See EQUITY, 5–7.

COMMISSIONS.

See SHIPPING, 4.

COMMON CARRIERS.

See CARRIERS.

COMPLAINT.

See PLEADING, 1–4.

CONDITIONAL SALE.

See SALES, 1.

CONFLICT OF LAWS.

See CORPORATIONS, 14; NEGLIGENCE, 11–13.

CONNECTING CARRIERS.

See CARRIERS, 47.

CONSIDERATION.

See SALES, 1.

CONSTITUTIONAL LAW.

See EMINENT DOMAIN, 3, 4; RAILROAD COMPANIES, 6; STATUTES, 2.

CONTEMPT.

1. FOUNDATION FOR. — A verified information may properly be allowed to perform the office of the affidavit made necessary by statute as the foundation of a proceeding for constructive contempt. *Mullin* v. *People*, 414.
2. JURISDICTIONAL FACTS. — When an affidavit is presented as the basis for a proceeding for contempt, the court must, in the first instance, examine the same, and if the facts presented do not show that a contempt has been committed, the court is without jurisdiction to proceed; if, however, the facts are sufficient, the court may take jurisdiction, and its subsequent orders will not be reviewed for mere error. *Id.*
3. PETITION FOR CHANGE OF VENUE may allege matter not *per se* contemptuous, without subjecting the petitioner to punishment for contempt. *Id.*

CONTRACTS.

1. STATUTE — WHAT IMPLIED IN. — Whatever the law necessarily implies in a contract or in a statute is as much a part thereof as if expressly stated therein. *State* v. *Laclede G. Co.*, 789.
2. STATUTE ATTEMPTING TO WITHDRAW AN APPROPRIATION BY ANNULLING A CONTRACT cannot accomplish such purpose, because the legislature has no power to annul contracts. *Carr* v. *State*, 624.
3. ENFORCEMENT OF, BY THIRD PARTY. — A contract may be enforced when entered into for the benefit of a third party, although he is not named. *State* v. *Laclede G. Co.*, 789.
4. CONTRACT IN RESTRAINT OF TRADE. — An agreement between manufacturers of wooden-ware, located in different states, by which one of them agrees to sell to the other, and not engage in the same business in eight specified states for five years thereafter, nor to allow the premises formerly occupied by him to be used for the purpose of manufacturing wooden-ware, nor to sell them to be used for that purpose, without the consent of the purchaser, is void, and unenforceable, as being in restraint of trade and contrary to public policy. *Western Wooden-ware Ass'n* v. *Starkey*, 686.
5. PARTIES IN PARI DELICTO LEFT WITHOUT REMEDY AGAINST EACH OTHER. — The law leaves without remedy against each other parties concerned in illegal agreements, provided they are *in pari delicto*. And this rule is applied to executed transactions as well as to those that are executory, and is enforced by courts of law as well as by courts of equity. Where, therefore, a fraudulent transaction has been consummated between the parties to an action of ejectment to the extent of vesting the title to the land in the plaintiff, and leaving the possession in the defendant, the law

will leave them as they are, and will not permit the plaintiff to recover the possession. *Kirkpatrick* v. *Clark*, 531.

See ABATEMENT; BANKS AND BANKING, 16; CARRIERS, 27–34; INSURANCE, 1–4; STATES, 1–4; USAGE, 1; WILLS, 2.

CONTRACTS OF SALE.

See SPECIFIC PERFORMANCE, 1, 2, 4; VENDOR AND PURCHASER, 1–14.

CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE, 6.

CORPORATIONS.

1. DECLARATION NEED NOT ALLEGE THAT CORPORATION KNOWS WHAT IT HAS OR HAS NOT DONE. — Since all accountable persons know what they do or do not do, it is no more necessary to allege in a declaration that a corporation knows what it has done or has not done, than it is to allege the same thing with regard to an individual; for the acts or non-acts of the servants of a corporation, within the sphere of their duty, are its acts or non-acts. And therefore, in an action against a railway company to recover damages for personal injuries alleged to have been received by one of its servants from its failure to fill in the spaces between the ties of its road with cinders or other substance, it is sufficient for the declaration to allege that it was the duty of the company to have filled such spaces, and it is not necessary to allege that the defendant knew of such defects in the construction of its track, switches, etc. *Chicago etc. R. R. Co.* v. *Hines*, 515.

2. DIRECTOR OR STOCKHOLDER OF CORPORATION NOT CHARGEABLE WITH KNOWLEDGE OF ITS TRANSACTIONS. — A director or stockholder of a corporation is not chargeable with actual knowledge of its business transactions merely because he is such director or stockholder. *Rudd* v. *Robinson*, 816.

3. BOOKS OF ACCOUNT OF CORPORATION NOT OF THEMSELVES COMPETENT EVIDENCE TO ESTABLISH LIABILITY OF DIRECTOR TO CORPORATION. — In an action brought in behalf of a corporation against one of its directors to establish an account or claim against him, the books of account of the corporation are not competent evidence, of themselves, to establish his liability. A corporation seeking to enforce a claim against one of its directors or stockholders must establish it by the application of the same rules of evidence that are applied in an action brought by an individual to enforce a claim against any defendant. *Id.*

4. LIABILITY OF CORPORATE OFFICERS FOR INCURRING DEBTS IN EXCESS OF CAPITAL STOCK ATTACHES WHEN. — The creditors of a corporation whose officers have incurred indebtedness in excess of its capital stock cannot proceed against such officers until such creditors have first obtained judgment against the corporation. The liability of such officers is, like that of a surety, *stricti juris*, and does not attach so long as the debts can be made out of the corporation, and no action can be maintained against them until the corporation is in default. *Woolverton* v. *Taylor*, 521.

5. SUIT TO ENFORCE INDIVIDUAL LIABILITY OF OFFICERS OF CORPORATION NOT SUIT FOR RECOVERY OF PENALTY. — A suit brought to enforce the individual liability of the officers of a corporation, imposed by section 16 of

chapter 32 of the Revised Statutes of Illinois, is not a suit for the recovery of a penalty, within the meaning of section 14 of the Illinois statute of limitations. *Id.*

6. CREDITOR OF CORPORATION MAY FILE BILL AGAINST OFFICERS FOR INCURRING EXCESSIVE INDEBTEDNESS, THOUGH ALL DEBTS NOT DUE. — It does not follow that because a creditor of a corporation who files his bill against the officers of the corporation to enforce their individual liability for a debt incurred by them in excess of its capital stock must allege and prove the corporation in default as to his debt, he cannot maintain the bill until all debts against the corporation are due. On a proper bill filed by a single creditor, the court has power to bring before it the corporation, all its officers who assented to the excessive indebtedness, as well as all its creditors, and ascertain the excess of the indebtedness over the capital stock, the amount of this to which each officer may have assented, and the extent to which the funds of the corporation may be resorted to for the payment of the debts, and also the number and names of the creditors, the amount of their several debts, to determine the sum to be recovered of the officers and apportioned among the creditors. *Id.*

7. CORPORATE INDEBTEDNESS EXCEEDING CAPITAL STOCK, LIABILITY OF OFFICERS CONTRACTING. — In the absence of statutory prohibition, it is not unlawful for the officers of a corporation to contract debts in excess of its capital stock, but it may, like individuals, contract debts to the full extent of its credit. The Illinois statute making the officers of corporations individually liable for contracting debts beyond a prescribed limit does not prohibit them from contracting indebtedness beyond the amount of their capital stock, nor does it inflict a penalty upon the officers for so doing. It simply gives to the creditors of corporations a new right of civil action against such officers. *Id.*

8. FOREIGN CORPORATION — WHAT CONSTITUTES DOING BUSINESS IN THE STATE. — A purchase of machinery by a foreign corporation in one state, to be transported and set up in another, is not within the provisions of a statute that foreign corporations shall not do business within a state until they have filed with the secretary of state a certificate designating their principal place of business therein and an agent upon whom process may be served. *Colorado Iron Works* v. *Sierra Grande Min. Co.*, 433.

9. FOREIGN CORPORATION DOING BUSINESS IN THE STATE. — No legislative permission is necessary to allow a foreign corporation to contract for and buy machinery and supplies in one state necessary to the transaction of its business in the state of its domicile, nor is it necessary, in order to allow a foreign corporation to sell its wares or manufactures to the citizens of another state. If in either case a debt is contracted, it may be collected in the courts of such state. *Id.*

10. FOREIGN CORPORATION — JURISDICTION IN SUIT AGAINST. — A foreign corporation may buy of a domestic corporation the same as of a natural person, and contract a debt for the articles so purchased. Such debt may be collected in the state where contracted, when the foreign corporation is brought within the jurisdiction by proper service of process. *Id.*

11. FOREIGN CORPORATION — PRESUMPTION. — Persons, including corporations, by contracting debts in a foreign jurisdiction will be presumed to have assented to its laws in regard to the collection of the debts, and it is not of controlling importance where or when the original contract out of which the indebtedness grew was perfected or became operative. *Id.*

12. FOREIGN CORPORATION — JURISDICTION IN SUITS AGAINST. — Where a corporation makes a contract in a state other than that in which it was chartered, it thereby submits itself to the jurisdiction of such foreign state, so far as to be liable to suit therein, in regard to that contract, when summoned according to the laws of that state. *Id.*

13. FOREIGN CORPORATION — SERVICE OF PROCESS UPON. — A stockholder in a foreign corporation who gratuitously transfers his stock to unknown trustees, for an unknown and undefined purpose, remains a stockholder so that a service of process on a foreign corporation, by delivery of the writ to a stockholder, when it has no agent or officer within the state, as provided by statute, may be made upon such corporation by delivery of the writ to him. *Id.*

14. DOMESTIC CORPORATION ENTITLED TO BENEFIT OF RESTRICTION UPON AMOUNT OF DAMAGES RECOVERABLE AGAINST IT. — Where a plaintiff sues in New York a corporation formed under the laws of that state, to recover damages for the death of her husband, resulting from injuries received in Pennsylvania, the defendant is entitled to the benefit of the restriction upon the amount of the damages recoverable under the New York law, although the Pennsylvania statute contains no such restriction. A domestic corporation has the right to be protected by the remedial limitations of its jurisdiction. *Wooden* v. *Western etc. R. R. Co.*, 803.

See BANKS AND BANKING; GAS COMPANIES.

COSTS.

THE MERE TAXATION OF COSTS IS A MINISTERIAL ACT, where there is no question of the amount to be taxed. *State* v. *Engle*, 655.

See EXECUTIONS, 6, 7; JUDGMENTS, 5.

CO-TENANCY.

DEEDS — JOINT OWNERS — INTEREST OF, HOW DETERMINED. — The interests of joint owners of land, in the absence of some other controlling fact, is to be determined by the proportion which the amount of purchase-money paid by each bears to the entire sum which was the consideration for the deed. *Huffman* v. *Mulkey*, 71.

COURTS.

PROBATE COURT — JURISDICTION TO TRY TITLE. — The probate court is without jurisdiction to try the title to property as between the representative of an estate and the husband of the deceased party claiming adversely thereto. *Stewart* v. *Lohr*, 150.

See JUDICIAL SALE, 1.

COVENANTS.

See ABATEMENT.

CRIMINAL LAW.

1. CRIME COMMITTED PRIOR TO ADMISSION OF STATE — PROSECUTION BY INFORMATION. — A party charged with grand larceny, committed prior to the admission of a state into the Union, is entitled to the United States constitutional guaranty of presentment by indictment by a grand

jury, and cannot be prosecuted therefor under an information authorized by the state constitution and statutes. *McCarty* v. *State*, 152.

2. THOUGH IT IS THE DUTY of a justice, on the conviction of the defendant, if he does not immediately pay the fine imposed, to commit him to jail, still the failure to commit him at once does not deprive the justice of the power to commit him at a subsequent time. *McLaughlin* v. *Hickison*, 658.

3. CHARACTER — PRESUMPTION IN ABSENCE OF PROOF. — An accused is not bound to put his character in issue. His omission to do so, or to show good character, does not justify a presumption that his character is bad, from which an inference of guilt can be drawn. *Bennett* v. *State*, 465.

4. CHARACTER — PRESUMPTION. — The character of a party accused of crime is presumed to be good, until the contrary is proved. *Id.*

5. CHARACTER. — GUILT OF ACCUSED must be proved beyond a reasonable doubt, whether his character is good or bad. *Id.*

6. CHARACTER — COMMENTS OF COUNSEL. — It is reversible error to allow counsel for the prosecution to argue, against objection, that want of testimony as to the character of the accused authorizes the jury to infer that his character is bad, although his counsel, in argument as to his good character, has gone outside the evidence. *Id.*

7. FUGITIVE FROM JUSTICE, RIGHT OF, TO BE HEARD ON APPEAL. — In courts of appeal, where none but questions of law can be reviewed, and in the absence of any statute specifically regulating the practice, if there is satisfactory evidence that a defendant, whose appeal is founded upon exceptions entered on the trial below, has been regularly called for hearing, has escaped, and is not in custody, it is clearly within the sound discretion of the court, in the absence of defendant and his counsel, to determine whether the exceptions shall be passed upon, the appeal dismissed, or the hearing postponed until the recapture of the defendant. Any judgment pronounced by such court in such case will not be void. Even when the court may review the facts, a defendant who escapes pending his appeal is deemed to have waived his right to be present on the final hearing. *State* v. *Jacobs*, 912.

8. PRESENCE OF PRISONER ON APPEAL. — The constitutional right of a party charged with crime to be present at his trial, to be informed of the charge against him, to introduce evidence, and to be represented by counsel extends only to the trial court, and does not apply to the appellate court, having jurisdiction to review only errors of law. *Id.*

9. PRESENCE OF ACCUSED ON APPEAL. — In a criminal case on appeal, the appellate court, having only jurisdiction to review questions of law, may proceed to hear and determine the case, and to enter judgment, whether the accused is charged with a misdemeanor or a capital felony, and whether he is or is not at the time of the hearing under bond for his appearance, in prison, or has escaped and is at large. *Id.*

10. BURGLARY WITH INTENT TO COMMIT RAPE ON WOMAN ASLEEP. — A man who burglariously enters a house with intent to have sexual intercourse with a woman while she is asleep is guilty of burglary. *Harvey* v. *State*, 229.

11. HOUSE OF ILL-FAME — EVIDENCE. — To prove the charge of keeping a bawdy-house or house of ill-fame, it must be shown that it was a common resort of people of both sexes for the purpose of prostitution, and proof of acts of illicit intercourse on the part of the occupants, without proof that it was kept for the convenience of people who visited

it to indulge in lewdness, will not sustain the charge. *State* v. *Webber*, 920.

12. LARCENY — SUFFICIENCY OF INFORMATION. — An indictment or information charging grand larceny, in taking "ninety-three railroad tickets," of an aggregate value, without alleging the value of each ticket taken, or that they were stamped, dated, signed, and genuine, is insufficient, as not stating facts sufficient to constitute the crime. *McCarty* v. *State*, 152.

See HABEAS CORPUS.

CURTESY.

See HUSBAND AND WIFE, 1.

DAMAGES.

1. MEASURE OF DAMAGES — LOSS OF PROFITS. — IN AN ESTABLISHED BUSINESS is wrongfully injured or destroyed, its owner can recover damages sustained thereby, and in an action for their recovery evidence of the profits he was actually making is admissible. Hence in an action against a lessor by his lessees for depriving them of the benefit of their lease, they may show the amount of business done by them before and after his alleged wrongful acts. *Hawthorne* v. *Siegel*, 291.

2. MEASURE OF DAMAGES. — DAMAGES WHICH ACCRUE SUBSEQUENTLY to a tort, and of which it is the primary cause, are not separate causes of action, but are parts of the tort itself, for which a cause of action is given. *Id.*

3. NEGLIGENCE — INJURY TO CHILD — UNLOCKED TURN-TABLE. — In an action against a railway company for negligently causing the death of a child in leaving a turn-table unfastened, the measure of damage is the loss occasioned by the death; and his health, mental and physical condition, and expectancy of life are proper subjects to be submitted to the jury for their consideration in estimating the damage sustained. *Ihocco R'y & Nav. Co.* v. *Hedrick*, 169.

4. EXCESSIVE VERDICT, WHEN SET ASIDE. — The supreme court will set aside a verdict as excessive in exceptional cases, and when satisfied that the evidence does not support the assessment of damages, as in other instances of failure of proof. *Furnish* v. *Missouri P. R'y Co.*, 781.

See APPEAL AND ERROR, 8; ASSAULT; CARRIERS, 11, 21-26, 40; CORPORATIONS, 14; NEGLIGENCE, 11-13; EMINENT DOMAIN, 2-4; FRAUD, 7; INJUNCTIONS, 2; JOINT LIABILITY; LIBEL AND SLANDER, 6, 7; TRESPASS, 1-3, 5; VENDOR AND PURCHASER, 12-14.

DEATH.

See EXECUTIONS, 4.

DEBTOR AND CREDITOR.

See ATTACHMENT AND GARNISHMENT, 6; BANKS AND BANKING, 1, 2; CORPORATIONS; INSANE PERSONS; PAYMENTS, 2; STATES, 5.

DECLARATION.

See PLEADING, 4.

DECLARATIONS.

See AGENCY, 8; BOUNDARIES, 5; EVIDENCE, 4.

DEEDS.

1. RATIFICATION OF. — A party who recognises the validity of a deed made without his knowledge or consent thereby becomes a party to and is bound by it. *Huffman* v. *Mulkey*, 71.

2. TITLE TO LAND CANNOT BE DIVESTED BY SURRENDER AND CANCELLATION OF GRANTEE'S DEED. *Watters* v. *Wagley*, 232.

3. DEED CONSTRUED TO CONVEY ESTATE FOR LIFE WITH REMAINDER IN FEE. — A father executed a deed of conveyance of land to his four children, "and the heirs of their bodies, party of the second part." In the granting clause and the *habendum*, the words "heirs and assigns" were used without the words "of their bodies." Immediately preceding the *habendum* was inserted the clause: "Meaning and intending by this conveyance to convey to my said children the use and control of said real estate during their natural lives, and at their death to go to their children; should they die without issue, to their legal representatives." It was held to clearly appear from this clause that the grantor, by the use of the word "heirs," in other parts of the deed, meant "children," and the deed was construed to convey to the grantor's children a life estate only, with remainder in fee to their children. *Griswold* v. *Hicks*, 549.

4. WORD "HEIRS" MAY BE CONSTRUED TO MEAN "CHILDREN" WHEN. — The word "heirs," in a deed, may be construed to mean "children," when it clearly appears from other parts of the deed that it is not used by the grantor in its legal, technical meaning. *Id.*

5. REGISTRATION AS NOTICE — INDEXING. — A grantee who merely deposits his deed for record in the auditor's office, or other proper office, where it is received by the proper officer, does not thereby convey notice to the public, so that his title cannot be prejudiced through the fault or negligence of the officer in not recording the deed. In order that the deed may constitute constructive notice, it must be duly and properly recorded and indexed, the index being an essential part of the record. *Ritchie* v. *Griffiths*, 155.

6. REGISTRATION — RECORDER AGENT OF GRANTEE. — The recorder to whom a grantee gives his deed for the purpose of having it recorded is his agent, and not the agent of a subsequent innocent purchaser. The recorder is responsible to the grantee only in damages for his refusal or neglect to record the deed according to law, and it is the duty of the grantee to see that it is properly recorded, or accept the consequences as between himself and innocent third parties who are misled. *Id.*

7. CERTIFICATE OF REGISTRY NOT EVIDENCE OF REGISTRATION. — A certificate that a deed is properly recorded, given by the recorder to the grantee, does not relieve the latter of the responsibility of seeing that the deed is properly recorded, so as to affect the rights of an innocent purchaser, although it may aid the grantee in recovering damages from the recorder. *Id.*

See ADVERSE POSSESSION; CO-TENANCY; INFANCY, 2; MORTGAGE, 1.

DEFINITIONS.

Accretion. *St. Louis etc. R'y Co.* v. *Ramsey*, 195.
"Act of God." *Blythe* v. *Denver etc. R'y Co.*, 403.
Alluvion. *St. Louis etc. R'y Co.* v. *Ramsey*, 195.
Bawdy-house. *State* v. *Webber*, 920.
Book-canvasser. *Emmons* v. *Lewistown*, 540.

"Boarders." *Moore* v. *Long Beach D. Co.*, 265.
"Children." *Griswold* v. *Hicks*, 549.
Debt. *Dunsmoor* v. *Furstenfeldt*, 331.
Eminent domain. *Murphy* v. *Mayor*, 345; *Gainesville etc. R'y Co.* v. *Hall*, 62.
Gift *inter vivos*. *Williamson* v. *Johnson*, 117.
"Hawker." *Emmons* v. *Lewistown*, 540.
"Head of family." *Holloway* v. *Holloway*, 484.
"Heirs." *Griswold* v. *Hicks*, 549.
"Heirs and assigns." *Id.*
"Heirs of their bodies, party of the second part." *Id.*
House of ill-fame. *State* v. *Webber*, 920.
"Inevitable accident." *Blythe* v. *Denver etc. R'y Co.*, 402.
"Location." *McFeters* v. *Pierson*, 388.
"Mining claim." *Id.*
Money *in custodia legis*. *Dunsmoor* v. *Furstenfeldt*, 331.
Non-resident. *Carden* v. *Carden*, 876.
"Owner." *McFeters* v. *Pierson*, 388.
"Peddler." *Emmons* v. *Lewistown*, 540.
Penalties. *Harbor Commissioners* v. *Redwood Co.*, 321.
"Pool." *Cleveland etc. R'y Co.* v. *Closser*, 593.
Postal-clerk. *Magoffin* v. *Missouri P. R'y Co.*, 796.
"Society." *Furnish* v. *Missouri P. R'y Co.*, 800.

DEMAND.

See VENDOR AND PURCHASER, 15.

DEPOSITIONS.

DEPOSITION EXCLUDED FOR INCOMPETENCY SHOULD BE OFFERED ANEW, IF SUBSEQUENT EVIDENCE REVEALS ITS COMPETENCY. — A deposition which is properly excluded for incompetency in the state of the case when it is offered should be offered in evidence again, if subsequent evidence reveals its competency. And if the party offering it fails to do this, he cannot complain of the ruling of the court excluding it. *Jones* v. *St. Louis etc. R'y Co.*, 175.

DEPOSITS.

See BANKS AND BANKING.

DESCENT AND DISTRIBUTION.

See WILLS, 3, 4.

DISCRIMINATION.

See CARRIERS.

DISORDERLY HOUSE.

See CRIMINAL LAW, 11; LIBEL AND SLANDER, 8.

DITCHES.

See LICENSE, 1, 2.

DOCUMENTARY EVIDENCE.

See EVIDENCE, 1, 2.

DOWER.

PRESUMPTION. — DEVISE OR BEQUEST to a widow is presumed to be in addition to her dower, unless it clearly appears that it was the intention of the testator that it was to be in lieu thereof. *Hatch's Estate*, 109.

See EQUITY, 1; HOMESTEAD, 2-5; HUSBAND AND WIFE, 2.

DURESS.

PLEADING — EVIDENCE. — DURESS in the execution of a conveyance should not be permitted to be proved, unless specially pleaded. *Nordhoff* v. *Nordhoff*, 268.

EASEMENT.

See ACTIONS, 2; TRESPASS, 6.

EJECTMENT.

LEGAL TITLE TO LAND CANNOT BE PROVED BY PAROL EVIDENCE in an action of ejectment. *Kirkpatrick* v. *Clark*, 531.

2. EQUITABLE TITLE CANNOT BE SHOWN IN DEFENSE IN EJECTMENT. — Only legal titles can be investigated in an action of ejectment, and the equitable title of the defendant cannot be shown in defense. *Id.*

3. MORTGAGOR CANNOT MAINTAIN EJECTMENT AGAINST HIS MORTGAGEE UNTIL the debt is paid, and it cannot be paid by mere lapse of time. *Spect* v. *Spect*, 314.

See TRUST AND TRUSTEE, 1.

ELECTION.

See HOMESTEAD, 2-5.

ELECTIONS.

See OFFICE AND OFFICERS, 1, 2; TAXATION, 5.

EMINENT DOMAIN.

1. DIVERSION OF SMALL AND PRIVATE WATERCOURSE by a city for the purpose of drainage and sewerage, with the consent and approval of the land-owners through whose land it runs, is not an exercise of the right of eminent domain. *Murphy* v. *Mayor etc. of Wilmington*, 345.

2. DAMAGES — INJURY FROM CONSTRUCTION AND OPERATION OF PUBLIC WORKS. — When by the construction of any works there is a physical interference with any right, public or private, which the owner or occupier of property is by law entitled to make use of in connection with such property, and which gives an additional market value thereto apart from the uses to which any particular owner or occupier may put it, there is a right to compensation, if, by reason of such interference, the property, as property, is lessened in value. *Gainesville etc. R'y Co.* v. *Hall*, 42.

3. CONSTITUTIONAL LAW — DAMAGES FOR OPERATION OF PUBLIC WORKS. — A constitutional provision that "no person's property shall be taken, damaged, or destroyed for or applied to a public use without adequate compensation being made" is sufficiently comprehensive to include damages resulting from the operation of public works, as well as those which are inflicted by their construction. *Id.*

CONSTITUTIONAL LAW — DAMAGES FOR OPERATION OF RAILROAD. — Under a constitutional provision that "no person's property shall be taken, damaged, or destroyed for or applied to a public use, without adequate compensation being made," a land-owner whose property is injured by the construction of a railroad, and the vibration, smoke, noxious vapors, and noise of passing trains, is entitled to damages, although such road is not upon his land nor is any of his property taken in its construction. *Id.*

EQUITY.

1. COURT OF EQUITY CANNOT REFORM DEED OF MARRIED WOMAN. — A court of chancery cannot reform the deed of a married woman not acting as a *feme sole*. And where a husband and wife join in a conveyance of her land, which by mistake conveys only her dower interest therein, although she intended to convey her entire estate, acts passed to cure defectively acknowledged deeds of married women do not apply to such conveyance. *Bowden* v. *Bland*, 179.

2. PARTIES TO SUIT IN EQUITY, WHO ARE PROPER. — The rules of pleading in equity, while the same in form with those in actions at law, are broader and more elastic, by reason of the inherent character of the relief which may be sought and given; and it is a general rule in equity that all persons materially interested, either legally or beneficially, in the subject-matter of a suit are to be made parties to it, so that there may be a complete decree which shall bind them all. *Townsend* v. *Bogert*, 835.

3. CLAIMANT MAY BE MADE PARTY AND REQUIRED TO DISCLOSE HIS INTEREST WHEN. — Where a plaintiff in a suit in equity knows that a third person claims an interest in the subject-matter of the suit, but does not know the nature, extent, or merits of the claim, he may state the facts, call in the claimant as a party, and require him to disclose his alleged interest. *Id.*

4. EQUITY WILL NOT ENTERTAIN JURISDICTION when the only object is to obtain a consolidation of actions or to save the expense of separate actions, or where the claim of right rests on a mere question of law, as for ascertaining the legality of the proceedings of a municipal corporation in levying a tax. *Murphy* v. *Mayor etc.*, 345.

5. CLOUD ON TITLE. — A lien or encumbrance, to throw a cloud on title to real property so as to give the owner a right to relief in equity, must be one that is regular and valid on its face, though in fact irregular and void from circumstances which must be proved by extrinsic evidence. *Id.*

6. ILLEGAL ASSESSMENT — CLOUD ON TITLE. — Where the illegality of a municipal assessment or tax is apparent on the record of the proceedings, and requires no extrinsic evidence to show it, such assessment or tax is not a cloud upon title, and the remedy of the owner is by action at law, and not by suit in equity. *Id.*

7. CLOUD ON TITLE — ILLEGAL MUNICIPAL ASSESSMENT. — Where a city ordinance imposes certain conditions which must be complied with in order to make a local municipal assessment or tax valid, a failure to comply with any one of the conditions renders the tax void; and when such failure appears from the face of the proceedings, no cloud on the title is created, and the remedy of the land-owner is by action at law, and not by suit in equity. *Id.*

See BANKS AND BANKING, 9; CONTRACTS, 5; EJECTMENT, 2; JUDGMENTS, 4, 5; PENALTY, 3; SET-OFF, 1, 5.

ERROR.

See APPEAL AND ERROR.

ESTOPPEL.

1. EXECUTOR NOT ESTOPPED BY HIS OWN VOID DEED. — An executor is not estopped by his own void deed of land from suing to dispossess persons claiming under it. *Chase* v. *Cartright*, 207.

2. FRAUDULENT CONVEYANCE. — A judgment creditor who sells an equity of redemption under execution, thereby asserts the validity of the mortgage, and is estopped from afterwards denying its validity by asserting that it was fraudulent as to creditors. *Knoop* v. *Kelsey*, 777.

3. ESTOPPEL IN PAIS AGAINST MARRIED WOMAN MUST BE SPECIALLY PLEADED as new matter, to be available as a defense, and cannot be proved under a general or specific denial. *De Votie* v. *McGerr*, 426.

4. ADVANTAGE TAKEN OF VOID DIVORCE DECREE, WHEN AN ESTOPPEL. — When a wife, without cause, deserts her husband and home, lives for years in adultery, and afterwards, learning that a divorce has been procured by her deserted husband, causes a marriage ceremony to be performed with her paramour, and continuously lives and cohabits with him as his wife until the death of her abandoned husband, she cannot take advantage of the fact that the divorce decree is void for want of proper service of process, and successfully assert against the heirs her right, under the statute, to the estate of the deceased husband as his widow, notwithstanding these facts were not brought to the notice of the court at the time that the divorce decree was adjudged invalid. *Arthur* v. *Israel*, 381.

5. ESTOPPEL BY TAKING ADVANTAGE OF VOID DIVORCE DECREE. — A husband or wife who accepts the benefits and privileges of a void decree of divorce cannot afterwards repudiate his or her action, and urge its invalidity. *Id.*

6. ESTOPPEL BY TAKING ADVANTAGE OF VOID DIVORCE DECREE. — Public policy as well as private interest requires that, so far as is consistent with law, one who has attempted to profit by a supposed divorce, and has exercised the resulting privilege of remarriage, shall not, for the mere purpose of obtaining property, be permitted to repudiate his election. *Id.*

See BANKS AND BANKING, 10; DEPOSITION; INSURANCE, 2; MUNICIPAL CORPORATIONS, 2, 3; PLEADING, 7.

EVIDENCE.

1. PROOF OF WRITTEN COMMUNICATION. — A witness cannot testify to facts communicated by him by letter to another, when the letter itself can be produced. *McDuff* v. *Detroit etc. Co.*, 673.

2. RECORDS OF BOARD OF HEALTH NOT EVIDENCE BETWEEN PRIVATE PARTIES OF FACTS RECORDED. — The records of a board of health of a city, required by police regulations to be kept for local and specific purposes, are not public records in such sense as makes them evidence in a controversy between private parties of the facts recorded. *Buffalo Loan etc. Co.* v. *Knights Templar etc. Ass'n*, 839.

3. LAWS OF ANOTHER STATE. — Though on a hearing on *habeas corpus* a single section of the criminal code of another state is read in evidence, the court will look to the whole code, to ascertain what the law of the state is upon the subject before it. *Ex parte Spears*, 341.

4. MINORS — ADMISSIBILITY OF DECLARATIONS AGAINST. — In an action by the guardian of minor orphan children of a vendee against the vendor under a contract for the sale of land, declarations made by the grandparents of such minors after the death of the parents, and without any authority to bind their interests, are inadmissible as against them. *Phillips* v. *Herndon*, 59.

5. VALUE OF PERSONAL PROPERTY, HOW PROVED IN ABSENCE OF LOCAL MARKET. — Where the value of personal property cannot be fixed by the proof of local markets, it may be done by proof of value at the nearest point where similar property is bought and sold, with proper addition or deduction for cost of transportation and the hazard and expense incident thereto, according as the property is held for sale or for use. But evidence of the value of such property in a distant market is not admissible unless it is proved that there is no adequate local market, or that the two markets are interdependent and sympathetic. *Jones* v. *St. Louis etc. R'y Co.*, 175.

6. WHEN ADMISSIBLE. — It is sufficient, to entitle evidence to admission, that there is some evidence, direct or circumstantial, tending to make it competent; for it is not necessary that the connecting evidence should distinctly establish the facts which give the character of competency to the testimony, as the court, in admitting testimony, does not conclusively adjudge that the evidence establishing its competency is sufficient to fully prove the requisite fact. It simply declares that there is some evidence tending to make the testimony competent. *Cleveland etc. R'y Co.* v. *Closser*, 593.

See ANIMALS, 1; APPEAL AND ERROR, 4; ASSAULT; BOUNDARIES; CARRIERS, 19, 20; DEEDS, 7; DURESS; FRAUD, 5; HUSBAND AND WIFE, 5; LIBEL AND SLANDER, 4, 5; PARENT AND CHILD, 1, 2; TRIAL, 4; USAGE, 2.

EXCESSIVE DAMAGES.

See DAMAGES, 4.

EXECUTION.

1. EXECUTION, EXEMPTION OF PROPERTY FROM. — Statutes exempting property from forced sale should be liberally construed. *In re McManus*, 250.

2. EXECUTION, EXEMPTION OF PROPERTY FROM. — The safe of a jeweler, necessary and useful in conducting his business, and without which he cannot conduct it to any profitable end, is exempt from execution as an implement of an artisan necessary to carry on his trade. *Id.*

3. EXECUTION MUST DESCRIBE JUDGMENT. — An execution must show upon what judgment or decree it is based, for and against whom it issues, the amount or amounts to be taken from the latter for the benefit of the former, and should also show the date at which, and the court where, the judgment was rendered. An execution which fails to show the judgment or decree upon which it issues is not, in legal contemplation, an execution at all, and confers no authority whatever upon the sheriff to whom it is directed. *Brown* v. *Duncan*, 545.

4. SALE MADE AFTER DEATH OF JUDGMENT DEBTOR under an execution issued prior to his death vests a good title in the purchaser, and though he is the judgment creditor, this will not avoid the sale, and if it renders it voidable, it can only be attacked directly or by answer calling for the equitable interposition of the court. *Benners* v. *Rhinehart*, 909.

6. RATIFICATION OF EXECUTION ISSUED WITHOUT AUTHORITY. — A plaintiff has the right to control the issuing of execution upon a judgment in his favor; but if an execution is issued without his authority, and he ratifies such act, the execution becomes valid and binding as to purchasers under it in good faith. *Wells* v. *Bower*, 570.

6. SPECIAL EXECUTIONS NOT AUTHORIZED WHEN. — A decree ordering each of the defendants in an action to pay a certain proportion of all the costs does not authorize the issuance of special executions. Except in cases provided for by the statute, executions, in Illinois, are general, and the right of the party in whose favor the writ is issued to elect on what property not exempt from execution he will have the same levied does not give him a right to a special execution. *Brown* v. *Duncan*, 545.

7. SEPARATE EXECUTIONS MUST BE ISSUED WHEN. — Where the court orders each of the defendants in an action to pay a certain proportion of all the costs, execution can only properly issue against each of such defendants separately for that proportion, when assessed by the clerk. One is in no way liable for the costs adjudged against another, nor is any joint liability created by such order. *Id.*

See JUDICIAL SALE, 2.

EXECUTORS AND ADMINISTRATORS.

DEVISE TO EXECUTORS PASSES TITLE IN FEE WHEN. — Where a testator by his will gives his property, both real and personal, to his executors, with power to dispose of it to the best of their judgment, directs them to pay certain large legacies, and devises over the estate then remaining, the executors hold the legal title to the property in fee, in trust, for the *cestuis que trustent*. *Chase* v. *Cartright*, 207.

See ABATEMENT; ESTOPPEL, 1; SURETYSHIP, 1, 2.

EXEMPTION.

See EXECUTIONS, 1, 2.

EXPERTS.

See WITNESSES, 1.

EXTRADITION.

1. FUGITIVE FROM JUSTICE — HABEAS CORPUS. — The governor of the state has no authority to issue his warrant for the arrest of an alleged fugitive from justice, unless he has been charged with crime in a state whence it is alleged he has fled, either by indictment or affidavit; and whether he is so charged is a question of law, always open, on the face of the papers, to judicial inquiry, on an application for his discharge on *habeas corpus*. *Ex parte Spears*, 341.

2. FUGITIVE FROM JUSTICE IS NOT CHARGED WITH A CRIME AUTHORIZING THE GOVERNOR TO ISSUE A WARRANT for his arrest, when the only charge against him is contained in an affidavit, stating that the affiant has reason to believe, and does believe, that he has committed a certain crime, naming it. *Id.*

FALSE REPRESENTATIONS.

See FRAUD.

FENCES.
See RAILROAD COMPANIES, 6.

FINDINGS.
See TRIAL, 5, 6.

FINDINGS OF FACT.
See APPEAL AND ERROR, 2, 9.

FIXTURES.
1. ENGINE, WITH ITS BOILER AND ATTACHMENTS, placed upon and securely attached to the public lands of the United States by the locator and occupier of a mining claim thereon, for the purpose of operating such claim, constitutes a part of the realty, and therefore is not liable to seizure and sale under execution as personalty. *Roseville A. Min. Co.* v. *Iowa G. Min. Co.*, 373.
2. MACHINERY — RULE FOR DETERMINING. — The intention of the owner in attaching machinery to land must be considered in deciding whether or not it becomes a fixture; and if it appears that he attached the machinery with a view to its remaining permanently, it must be treated as real estate. His intention is to be inferred from the nature of the article affixed, the relation and situation of the party making the annexation, the structure and mode of annexing, and the purpose for which the annexation has been made. *Id.*

FORECLOSURE.
See MORTGAGE, 9–12.

FOREIGN CORPORATIONS.
See CORPORATIONS, 8–13.

FORFEITURE.
See STATUTES, 1.

FORGERY.
See BANKS AND BANKING, 10–12.

FRAUD.
1. FRAUD MUST BE SPECIALLY PLEADED in an answer, as well as in a complaint, to be available as a defense. *De Votie* v. *McGerr*, 426.
2. FRAUD MUST BE SPECIALLY PLEADED. — When defendant's claim of title springs out of or rests upon the alleged fraud or fraudulent conduct of plaintiff, so that but for the fraud plaintiff's title would be good, such fraud, being the source and foundation of defendant's claim, is essentially new matter, and must be pleaded, or it cannot be proved. *Id.*
3. SUFFICIENT ALLEGATION OF. — A complaint alleging facts which, if proved to be true, would establish fraud as a conclusion of law sufficiently alleges fraud, without a specific declaration that such facts are fraudulent. *Andrews* v. *King County*, 136.
4. PLEADING FRAUD WHEN NECESSARY. — When a sheriff is sued for possession or conversion of property, and denies the title of the plaintiff, he may,

under such denial, prove that a transfer to plaintiff was made to hinder, delay, or defraud creditors of the vendor, and that the sheriff represents one of such creditors. *Mason* v. *Vestal*, 310.

5. PROOF OF INTENT. — The intention of one party to deceive and defraud another is sufficiently made out by showing that a false affirmation has in fact been made by the party concerning a matter about which he has no actual knowledge, under circumstances showing that the matter spoken about was better known to the party making the representations than to the other party. *Lahay* v. *City Nat. Bank*, 407.

6. FALSE REPRESENTATIONS — RECOVERY OF MONEY PAID IN CONSEQUENCE OF. — Where a bank innocently and ignorantly pays money to the holder of an instrument, relying upon the false representation of a third person that he knows the holder to be the true payee, it may recover from such person the amount which it is afterwards compelled to pay to the true payee in consequence of its reliance upon such representations. The statute of frauds is not a defense in such case. *Id.*

7. FALSE REPRESENTATIONS — LIABILITY OF PARTY MAKING. — When one positively assures another that a certain statement is true, knowing it to be false, and professing at the time to speak of his own knowledge, and about a matter not known to the party to whom the representations are made, he is not allowed to complain that too much reliance has been placed upon the truth of his statement, and is liable for all damages resulting therefrom. *Id.*

See AGENCY, 6; BANKS AND BANKING, 8, 9; JUDGMENTS, 4, 5; TRUST AND TRUSTEE.

FRAUDULENT CONVEYANCES.

1. SALE MADE TO HINDER, DELAY, OR DEFRAUD CREDITORS IS, as to them, absolutely void, and not voidable merely. *Mason* v. *Vestal*, 310.

2. THOUGH A DEBTOR CONVEYS PROPERTY with the intention of defrauding his creditor, the latter cannot complain, if the former retains or subsequently acquires property out of which the debt may be collected. *Brumbaugh* v. *Richcreek*, 648.

3. A CREDITOR CANNOT MAINTAIN AN ACTION TO SET ASIDE A CONVEYANCE of his debtor as fraudulent, unless he shows that his debtor has not, at the time the action is brought, any property out of which the payment of the debt can be compelled, though when made, such conveyance left the debtor without any property subject to execution. *Id.*

4. BONA FIDE PURCHASER FROM FRAUDULENT VENDEE. — A purchaser from an insolvent debtor who sells in fraud of his creditors must prove that, without notice of the fraud, he paid the purchase-money, or gave his negotiable note therefor; otherwise he acquires no title, and will not be protected. *Tillman* v. *Heller*, 77.

5. BONA FIDE PURCHASER — PART PAYMENT — BURDEN OF PROOF. — An innocent purchaser from an insolvent debtor selling in fraud of his creditors, who only pays part of the consideration in cash, and gives his note for the balance, will be protected only to the extent of the payment actually made, unless the note is negotiable; and the burden of proof is upon him to show its negotiability. *Id.*

6. INTENT — BONA FIDE PURCHASER — BURDEN OF PROOF, WHEN SHIFTS. — Under a statute making conveyances in fraud of creditors void as to them, and providing that "this article shall not affect the title of a pur-

chaser for a valuable consideration, unless it appear that he had notice," the creditor, in order to defeat the conveyance, is bound, first, to show the fraudulent intent; the purchaser must then, in order to sustain his purchase, show that he has paid value; this being shown, the burden again shifts, and the creditor, in order to prevail, must show that at the time of the payment the purchaser had notice of the fraud. *Id.*

See ESTOPPEL, 2; FRAUD, 5; INSANE PERSONS.

FRAUDULENT REPRESENTATIONS.

See SALES, 2.

FUGITIVE FROM JUSTICE.

See CRIMINAL LAW, 7–9; EXTRADITION.

GARNISHMENT.

See ATTACHMENT AND GARNISHMENT.

GAS COMPANIES.

1. CONTRACT RIGHTS UNDER CHARTER — REGULATION OF PRICE OF GAS. — A charter granted by the state to a gas company, giving it the power to make and vend gas, constitutes a contract between it and the state, and carries with it the right to fix the price of gas thus made and sold; and after it has accepted the terms of an ordinance passed by a city fixing the price of gas supplied to it by such company, the price thus fixed cannot be reduced by legislative action, state or municipal. *State* v. *Laclede G. Co.*, 789.

2. POLICE POWER — REGULATION OF PRICE OF GAS — CONTRACT RIGHTS UNDER CHARTER. — Where a state has granted a company, by charter, the right to make and vend gas, it has the right to fix the price of gas sold by it, and the subsequent regulation of such price by the state or by municipalities is not an exercise of police power which cannot be abridged by contract. *Id.*

See MUNICIPAL CORPORATIONS.

GIFTS.

1. GIFT MADE PERFECT BY DELIVERY and acceptance, and by a competent party, is irrevocable; but to constitute a gift *inter vivos*, the donor must voluntarily deliver the property and part with all present and future dominion over it. *Williamson* v. *Johnson*, 117.

2. GIFT IN CONTEMPLATION OF MARRIAGE — REVOCATION OF. — Where a woman receives money from a man for the purpose of carrying out her promise to marry him, and then refuses to keep her promise, without cause, she may be compelled to refund such money in an action of *assumpsit*. *Id.*

GOVERNOR.

See MANDAMUS, 4, 5.

GUARANTOR.

See NEGOTIABLE INSTRUMENTS, 3, 5, 6.

GUARDIAN AND WARD.

1. GUARDIAN CANNOT ACT FOR HIS WARD IN PARTITION WHEN. — A guardian whose interest is hostile to that of his ward is incompetent to act

for his ward in respect to that interest. Where, therefore, a guardian and his ward are tenants in common of land, it is error to decree a partition between them in a suit brought in the names of the guardian and the infant by such guardian. In such a case, the minor should either be made defendant and have a guardian *ad litem*, or should petition by his next friend or guardian *ad litem* and be represented by counsel distinct from those representing his guardian. A statute providing that an infant may, by his guardian or next friend, petition for partition of lands means when such guardian or next friend is competent to act in the case. *Roodhouse* v. *Roodhouse*, 539.

2. ADMISSIONS OF GUARDIAN DO NOT BIND WARD. — Where a guardian makes admissions inconsiderate, unnecessary, and prejudicial to the rights of his ward, the court will not permit the ward's rights to be prejudiced by such admissions. *Buffalo Loan etc. Co.* v. *Knights Templar etc. Ass'n*, 839.

HABEAS CORPUS.

THAT A JUDGMENT OF CONVICTION IS ERRONEOUS because the affidavit on which it was founded does not state a public offense does not entitle the defendant to be discharged upon *habeas corpus*. *McLaughlin* v. *Bliskie*, 658.

See EXTRADITION, 2.

HIGHWAYS.

1. HIGHWAYS BY USER. — A highway established by user need not be of the statutory width. A highway by user becomes such to the width and extent used. *Wayne County Sav. Bank* v. *Stockwell*, 708.

2. HIGHWAYS BY USER — ABANDONMENT. — A highway established by user, or any portion of it, may be lost by non-user, but the non-user will not affect the portion kept in use. *Id.*

HOMESTEAD.

1. WIDOW AND STEP-MOTHER AS HEAD OF FAMILY. — When a testator's widow, who is the step-mother of his minor children, undertakes, after his death, to keep together, care for, and support them, she has a right, as the head of a family, to take a homestead in his real estate. *Holloway* v. *Holloway*, 484.

2. HOMESTEAD AND DOWER — WIDOW'S RIGHT TO, UNDER WILL. — A devise by a husband to his wife does not extinguish the widow's right to both homestead and dower, unless such intent clearly appears from the terms of the will; and although it need not appear in express words, still, if it is doubtful, she will not be excluded. *Hatch's Estate*, 109.

3. RIGHT OF WIDOW TO, UNDER WILL. — A husband and father cannot by will deprive his widow and minor children of their homestead right, but the provisions of his will may be so clearly expressed to be in lieu of homestead that his widow may be compelled to choose which she will take, and by electing to take the former, renounce the latter. *Id.*

4. HOMESTEAD AND DOWER — WIDOW'S RIGHT TO. — Under a will by which a husband, after making two specific bequests, devised the residue of his estate, real and personal, one third to his wife, two ninths to his daughter, and four ninths to his son, the widow will take both her homestead and dower. *Id.*

5. HOMESTEAD AND DOWER — WIDOW'S RIGHT TO, UNDER WILL. — Where a widow who is a devisee under her husband's will occupies with her children and carries on the farm in which she claims a homestead for several years after her husband's death, without having either her homestead or dower set out to her, she is not thereby deprived of the right to both homestead and dower in her husband's estate. *Id.*

6. WHEN EXPIRES. — As against creditors, a homestead held by a widow in her deceased husband's estate does not expire until her death. *Holloway* v. *Holloway*, 484.

7. WHEN TERMINATES. — Whether widow's homestead in her deceased husband's estate lasts during her lifetime, as against the children, who have all arrived at age, or whether they are then entitled to a division of the estate as provided in their father's will, *quære*. *Id.*

8. SALE OF HOMESTEAD OF DECEDENT DURING MINORITY OF HIS CHILDREN VOID. — Where land owned by a father who leaves minor children was a homestead at the time of his death, a sale thereof made during their minority is void. *Kessinger* v. *Wilson*, 220.

9. ESTATES OF HOMESTEAD AND OF INHERITANCE SEPARATE AND DISTINCT WHEN. — Where a father seised of a homestead dies leaving two minor children as his heirs, they have two separate and distinct estates in the land, — an estate of homestead and an estate of inheritance, — their right to the possession and enjoyment of which does not exist at one and the same time, and neither of which estates is merged in the other. The heirs, in such case, have two rights of entry upon the land, — one when they become entitled to the homestead, and the other when the younger attains his majority. *Id.*

HOUSE OF ILL-FAME.

See CRIMINAL LAW, 11; LIBEL AND SLANDER, 8.

HUSBAND AND WIFE.

1. JUDGMENT LIEN AGAINST HUSBAND — EFFECT OF JOINT CONVEYANCE. — When husband and wife, by joint deed of bargain and sale, convey in fee-simple, and for full value, lands devised to her, the right of the husband to take as tenant by the curtesy is extinguished, and the purchaser takes the land free of any existing judgment liens against the husband. *Evans* v. *Lobdale*, 358.

2. HUSBAND NOT DEFRAUDED BY WIFE'S PURCHASING LAND SO AS TO PREVENT HIS RIGHT OF DOWER FROM ATTACHING. — It is no fraud upon a husband for his wife, in purchasing lands with her own separate means, or with means derived from sources other than her husband, to have the title conveyed to a trustee for the express purpose of preventing his right of dower from attaching thereto. *Kirkpatrick* v. *Clark*, 531.

3. NEGLIGENCE — RIGHT OF HUSBAND TO RECOVER FOR LOSS OF SOCIETY OF WIFE — BASIS OF RECOVERY. — A husband is entitled to recover compensation for the loss of the society of his wife, resulting from the negligence of a third party, and the word "society," in this connection, means such capabilities for usefulness, aid, and comfort as the wife possessed at the time of the injury. Any diminution of those capacities resulting from the negligence of a third person constitutes a just basis for an award of compensatory damages therefor. *Furnish* v. *Missouri P. R'y Co.*, 300.

4. NEGLIGENCE — LOSS OF SOCIETY OF WIFE — NECESSITY OF DIRECT PROOF OF VALUE. — In an action by a husband to recover for the loss of the

society of his wife, resulting from the negligence of a third party, direct proof of the value of such loss is not required; for upon the establishment of the fact of such loss, the assessment of reasonable compensation therefor necessarily rests in the discretion of the court or jury trying the fact. *Id.*

5. SEPARATE PROPERTY — EVIDENCE OF TITLE. — The return of separate personal property of the wife for assessment by her husband as his own, or of a mortgage of such property by him as his own, is not evidence against the wife's title, unless supplemented by proof of her knowledge and consent. *De Votie* v. *McGerr*, 426.

6. SEPARATE PROPERTY — HUSBAND'S DEBTS. — The separate property of a wife becomes subject to the payment of her husband's debts only when he is permitted to deal with and obtain credit upon it as his own, with her full knowledge and consent. *Id.*

7. MARRIED WOMAN CANNOT BIND HERSELF BY EXECUTORY CONTRACT TO CONVEY her real estate. *Watters* v. *Wagley*, 232.

See AGENCY, 6; EQUITY, 1; JUDGMENTS, 3; WILLS, 1.

IMPRISONMENT.

See CRIMINAL LAW, 2.

INDEMNITOR.

See JUDGMENTS, 14.

INDICTMENT.

See CRIMINAL LAW.

INFANTS.

1. RIGHT TO RECOVER FOR NECESSARIES. — A person who furnishes a minor who has no guardian with actual necessaries is entitled to recover therefor. *Burton* v. *Willis*, 363.

2. DEED MADE BY A MINOR IN EXECUTION OF A TRUST cannot be disaffirmed by him. *Nordholt* v. *Nordholt*, 268.

3. A MINOR WILL NOT BE PERMITTED TO ADOPT A PART OF AN ENTIRE TRANSACTION which is beneficial to him, and reject its burdens. Hence if a father of minors acts for them, they must either accept or repudiate the entire transaction; they cannot retain its fruits and at the same time deny its obligations. *Pearce* v. *McLaughlin*, 306.

4. MINORS CANNOT AVOID A MORTGAGE AND AFFIRM A DEED, WHEN BOTH ARE MADE AT THE SAME TIME, relate to the same property, and together make but one transaction. *Id.*

See DAMAGES, 3; GUARDIAN AND WARD; HOMESTEAD; RAILROAD COMPANIES, 1, 2.

INFORMATION.

See CRIMINAL LAW.

INJUNCTIONS.

1. INJUNCTION TO PREVENT THE REVOCATION OF A LICENSE TO BUILD A LEVEE on the lands of another will be granted, when, acting under such license, the licensee has constructed such levee, and it is necessary to protect his

lands from overflow; and the removal or destruction of such levee will also be enjoined. *Grimshaw* v. *Belcher*, 298.

2. DAMAGES. — Where an injunction is wrongfully issued and is framed in ambiguous terms, the defendant therein is entitled to recover such damages as he has sustained in obeying it as he reasonably and in good faith understood it. *Webb* v. *Laird*, 121.

See ATTACHMENT AND GARNISHMENT, 6; MUNICIPAL CORPORATIONS, 19; TAXATION, 2.

INNS AND INNKEEPERS.

1. INNKEEPER IS NOT LIABLE FOR LOSS OF BOARDER'S BAGGAGE and other valuables by fire, not shown to have been caused by the negligence of the innkeeper or his servants. *Moore* v. *Long Beach D. Co.*, 265.

2. INN, BOARDERS AT, WHO ARE. — One who goes to an inn kept as a pleasure resort, with his wife, with the determination to remain a long time, if her health should be benefited by her residence there, and arranges for terms of entertainment by the month at rates less than those charged transient customers, and who has no other place of residence, must be regarded as a boarder, and not as a guest, for the safety of whose baggage and other valuables the innkeeper is liable as an insurer against loss by accidental fire. *Id.*

INNUENDO.

See LIBEL AND SLANDER, 13–16.

IN PARI DELICTO.

See CONTRACTS, 5.

INSANE PERSONS.

CREDITOR OF PERSON OF UNSOUND MIND, whose mental unsoundness has not been judicially declared, cannot maintain a suit in equity to set aside a conveyance made by the debtor which does not injure the creditor. *Brumbaugh* v. *Richcreek*, 649.

See MARRIAGE AND DIVORCE, 1.

INSOLVENCY.

See NEGOTIABLE INSTRUMENTS, 10.

INSTRUCTIONS.

See APPEAL AND ERROR, 10; TRIAL, 7, 8.

INSURANCE.

1. WAIVER OF CONDITION. — A provision in a fire insurance policy that a loss shall be paid sixty days after due notice and proof thereof is waived by the absolute refusal of the company by its agent to pay the loss in any event; and the insured need not wait until the expiration of the sixty days before commencing suit. *California Ins. Co.* v. *Gracey*, 276.

2. ESTOPPEL BY ACTS OF AGENT. — Where a special agent and adjuster for an insurance company, during negotiations subsequently to a loss, secures an attorney to assist him in investigating it, interviews the insured and his attorney in relation to proofs thereof, seeks to cancel the claim of the assured against the company upon reimbursement of premiums

paid, and, without disclosing his want of authority, positively refuses to pay the loss, the company is estopped from setting up and relying upon such want of authority on the part of the agent as a defense. *Id.*

8. DECLARATIONS BY AGENT, WHEN BINDING. — Declarations made by a special agent and adjuster of losses for an insurance company, directly in connection with the business he is authorized to transact, and, to all appearances, fairly within the scope of his agency, are binding upon the company. *Id.*

4. LIMITATION OF POWER OF AGENT, WHEN NOT BINDING ON INSURED. — The power of insurance agents may be limited by the companies, but parties dealing with them as to matters within the real or apparent scope of their agency are not affected by such limitations, unless they have notice thereof. *Id.*

5. IN CONSTRUING A POLICY OF INSURANCE, the court should lean against that construction which imposes upon the assured the obligation of a warranty. *National Bank* v. *Union Ins. Co.*, 324.

6. IN DETERMINING WHETHER A STATEMENT IN A POLICY OF INSURANCE IS A WARRANTY on the part of the assured, the entire policy must be considered, and if, from the whole, it appears that such statement was not intended as a warranty, it will not be so construed. *Id.*

7. UNINTENTIONAL MISSTATEMENT BY AN ASSURED will not be treated as a breach of warranty rendering his policy void, when the policy itself declares that fraud, false swearing, misstatement, or concealment of a material fact by the assured shall render this policy void. *Id.*

8. CHANGE IN THE POSSESSION OF THE PREMISES INSURED will not avoid a policy of insurance made payable to a mortgagee, if he was not aware of such change, and the policy provided that it should not affect him, unless he should fail to give notice thereof after the change became known to him. *Id.*

9. MORTGAGEE IS STILL PROTECTED BY A POLICY OF INSURANCE MADE PAYABLE to him, though he has foreclosed the mortgage and purchased the property at the sale, if the mortgagor retains the right to redeem from the sale. *Id.*

10. SUPPRESSION OF MATERIAL FACTS — WAIVER BY COMPANY — EVIDENCE. — In an action to recover on an accident insurance policy, which is resisted on the ground that the insured suppressed the fact of his deafness by stating that he was free from any bodily infirmity at the time he was insured, the actual knowledge of such deafness by the insurer's agent at the time is constructive notice of it to his principal, and constitutes a waiver of objection that the deafness was a bodily infirmity, although the policy provided that such agent should have no power to waive its conditions. Hence evidence that such agent knew or ought to have known of such deafness when he solicited and secured the policy is admissible. *Follette* v. *United States M. Acc. Ass'n*, 878.

11. WAIVER OF REPRESENTATIONS AS TO BODILY INFIRMITY — EVIDENCE. — An application for insurance constitutes part of the contract between the insurer and the insured, and the representations contained in it are, presumptively, inducements to the former to enter into it. But when it appears that an agent, through whom the company acts, himself examined or frequently conversed with the applicant, who was partially deaf, had opportunity to test the extent of his infirmity, and afterwards solicited, or forwarded with favorable recommendation, his application for insurance against accident, the insured is not precluded

from showing the fact as evidence that the insurer knew of and assented to the defective hearing, and waived objection to the risk on account of it. *Id.*

22. INFORMATION AS TO CAUSE OF DEATH OF INSURED CANNOT BE REQUIRED BY INSURER WHEN. — Where a contract of life insurance obligates the insurer to pay the amount of the policy to the heirs or legal representatives of the insured "within sixty days after due notice and satisfactory proof of the death" of the insured, without requiring that the cause of death should be communicated, the insurer has no right to demand information of the cause of the death. All that he can require is, that the fact of death shall be shown with reasonable definiteness and certainty. *Buffalo Loan etc. Co.* v. *Knights Templar etc. Ass'n*, 330.

23. CERTIFICATE OF ATTENDING PHYSICIAN CANNOT BE REQUIRED AS PART OF PROOFS OF DEATH OF INSURED WHEN. — Where there is no usage known to the insured, nor any provision in the policy requiring that the certificate of the attending physician of the insured shall be furnished as part of the proofs of death, such certificate cannot be required; and an offer to show that by the rules and regulations of the insurer such certificate was required was properly rejected. *Id.*

24. PHYSICIAN'S CERTIFICATE OF DEATH ADMISSIBLE AS ADMISSION OF PARTY WHEN. — Where a physician's certificate of death of the insured, in which a cause of death is stated, which would, if true, vitiate the policy, is furnished to the insurer as part of the proofs of death, although no cause of death was required to be stated, such certificate, though not admissible as original evidence of the cause of death, is admissible as an admission of the plaintiff in an action against the insurer to recover on the policy, and its reception in evidence does not violate a statutory provision prohibiting a physician from disclosing any necessary information acquired by him in a professional capacity. *Id.*

25. ACCIDENT INSURANCE — DEATH FROM INTENTIONAL ACT OF ANOTHER. — Under a provision in an accident insurance policy that the company shall not be liable for "intentional injuries inflicted by the insured or any other person," the fact that the insured is shot and killed by the intentional act of another precludes recovery under the policy, and an answer by the company, stating that the death of the insured was caused by intentional injuries inflicted by another during a personal altercation between them, states a good defense. *Travelers Ins. Co.* v. *McCarthy*, 624.

INTEREST.

1. INTEREST, WHEN DUE ON A CONTRACT OF THE STATE. — If a statute authorizes the issue of certificates for the payment of the principal and interest to which the faith of the state is pledged, and declares that the interest shall be paid half-yearly at the city of New York, but that if interest is not demanded before the expiration of thirteen months after it falls due then it shall be demandable only at the treasury of the state, such certificates bear interest to their maturity. *Carr* v. *State*, 624.

2. A SOVEREIGN IS NOT BOUND TO PAY INTEREST unless it has contracted so to do. *Id.*

3. RATE OF INTEREST ON CONTRACTS OF THE STATE AFTER THEIR MATURITY is the rate mentioned in the statute authorizing such contracts, and not the rate specified in the general statutes of the state giving interest on contracts. *Id.*

4. INTEREST ON INTEREST IS NOT ALLOWABLE ON A CONTRACT OR OBLIGATION OF A STATE, unless it has expressly promised to pay such interest. *Id.*

6. APPROPRIATION TO PAY THE PRINCIPAL AND INTEREST OF A BOND of a state does not authorize the payment of interest upon interest. *Id.*

See NEGOTIABLE INSTRUMENTS, 9; USURY, 1.

JOINT LIABILITY.

TORT-FEASORS ARE NOT JOINTLY LIABLE FOR DAMAGES resulting from their wrongful acts, where they act separately, and where they maintain different ditches, whereby waters are turned into a cañon, and there commingling, pass through the cañon, and flow over the plaintiff's lands, and cover it with sand and *débris*. In such a case, the several wrongdoers may be united as defendants in a suit to enjoin them from further injuring plaintiff's lands by maintaining such ditches, but cannot, in such suit, be subjected to a joint recovery for the damages which they thus occasioned. *Miller* v. *Highland D. Co.*, 254.

See MILLS AND MILL-DAMS.

JUDGMENTS AND DECREES.

1. COMPLAINT NECESSARY TO SUPPORT. — A judgment of a court of record, not based upon a complaint or written statement of the cause of action, is void. *Beckett* v. *Cousin*, 209.

2. ORDER CONFIRMING JUDICIAL SALE IS FINAL JUDGMENT. — An order confirming a judicial sale is a final judgment, and the court has no power to set it aside at a term subsequent to that at which it is rendered. *State Nat. Bank* v. *Neal*, 185.

3. MERGER — INJURIES TO HUSBAND AND WIFE BY SAME ACT OF NEGLIGENCE — SUCCESSIVE RECOVERIES BY HUSBAND. — Where husband and wife are both at the same time injured by the same act of negligence, a recovery by the husband for the injury to himself is not a bar to a subsequent action by him to recover for the loss of the society and services of his wife, and expenses incurred in curing her of the injury received. *Shogland* v. *Minneapolis St. R'y Co.*, 732.

4. COURT OF EQUITY HAS JURISDICTION TO IMPEACH DECREE FOR FRAUD AND COLLUSION. — A court of equity has jurisdiction of a bill filed by an infant to impeach a decree of the county court directing the sale of land to pay debts, when such infant's interest in the land is affected thereby, and there was fraud and collusion between the administrator and the guardian *ad litem* in concealing from the court the infant's interest in the land. *Griswold* v. *Hicks*, 549.

5. RELIEF IN EQUITY — FRAUD IN TAKING JUDGMENT FOR COSTS AFTER SETTLEMENT OF PLAINTIFF'S DEMAND. — If a defendant pays the amount of the plaintiff's demand, and enters into an agreement for the dismissal of the action, and thereafter subpœnas witnesses, and causes judgment to be entered against the plaintiff for the costs of procuring them, he is guilty of fraud, and the enforcement of the judgment will be enjoined in equity, if the plaintiff has no remedy in the original action. *Greenwalt* v. *May*, 660.

6. JUDGMENTS RENDERED ON RECORDS SHOWING AFFIRMATIVELY on their face that the court had no jurisdiction over defendant's person are void. *Arthur* v. *Israel*, 331.

7. JUDGMENT OF CONVICTION ERRONEOUS BECAUSE AFFIDAVIT upon which the prosecution was based did not charge a public offense is not void, where the justice entering the judgment had jurisdiction of the subject-matter and of the person of the defendant. *McLaughlin* v. *Etchison*, 658.

8. JUDGMENT WILL NOT BE SET ASIDE on the ground that since its rendition an item embraced therein has, without fraud, been recovered in a suit in another state. *Hoyle* v. *Mott*, 106.

9. APPEAL FROM DECREE DOES NOT DESTROY ITS EFFECT AS FORMER ADJUDICATION. — An appeal from a decree does not vacate or set it aside, but simply suspends its operation, leaving it in full force as a merger of the cause of action, and a bar to its further prosecution. *Moore* v. *Williams*, 563.

10. FORMER ADJUDICATION OPERATES AS ESTOPPEL WHEN. — A prior adjudication of the same subject-matter between the same parties, although in a different mode of proceeding, operates as an estoppel upon the parties against subsequent litigation, as to all matters that were actually in controversy and decided in that adjudication. Therefore a party who has established his title to land by a decree in chancery, under which he has been put into possession, will be estopped from prosecuting to judgment an action of ejectment to recover possession of the same land. *Id.*

11. JUDGMENT BY CONFESSION RENDERED IN ANOTHER STATE CANNOT BE COLLATERALLY ATTACKED. — A judgment by confession rendered by a court of general jurisdiction in another state, the record being regular, and showing an appearance on behalf of the defendant, and that such appearance was authorised by power of attorney duly executed by such defendant, cannot be collaterally attacked in a sister state. The same faith and credit must be given such judgment as if rendered within the state. *Kingman* v. *Paulson*, 611.

12. JUDGMENT BY CONFESSION RENDERED IN ANOTHER STATE — COLLATERAL ATTACK — RES JUDICATA. — A judgment by confession rendered by a court of general jurisdiction in another state, against a man and his wife, fixes her *status* and relation to the debt on which the action was brought, and her liability for its payment; and in attachment proceedings against her property instituted on the judgment in another state, she cannot, for the first time, set up as a defense that the debt represented by the judgment is the debt of her husband, and that she was only surety upon the note sued upon and merged in such judgment. *Id.*

13. COLLATERAL ATTACK. — A judgment is not void unless the thing lacking or making it so is apparent in the record; and unless a judgment is void, it cannot be collaterally attacked, although it may be voidable. *Id.*

14. INDEMNITOR, JUDGMENT AGAINST PRINCIPAL NOT CONCLUSIVE AGAINST, WHEN. — Where a constable sues upon a bond given to indemnify him for the seizure of property under execution, a judgment against him for damages for making such seizure, rendered in a suit of which the indemnitors had no notice, is only *prima facie* evidence against them, and they may defend by showing that the constable had a good defense to the action against him. *Robinson* v. *Baskins*, 202.

15. PARTY CANNOT COMPLAIN OF DECREE IN HIS FAVOR. — A party cannot complain of a portion of a decree which is solely for his benefit, and takes from him no right. *Griswold* v. *Hicks*, 549.

16. MOTION IN ARREST OF JUDGMENT CANNOT BE MADE WHEN. — A party cannot move in arrest of judgment in the trial court, after judgment of that court upon a demurrer presenting the same objection to the declara-

tion. But under the Illinois Practice Act, if any counts of a declaration are so defective as not to support the judgment, the court may disregard the faulty counts, or render judgment thereon for the defendant. *Chicago etc. R. R. Co.* v. *Hines*, 515.

17. SALE ON EXECUTION AFTER EXPIRATION OF JUDGMENT LIEN. — The issuing and levy of execution during the lifetime of the judgment lien will not continue the lien beyond the time limited by statute. To preserve the priority acquired by the judgment, the sale must be made during the statutory period, and the purchaser at a sale made thereafter under an execution issued during the lifetime of the judgment lien takes title subject to all liens existing at the date of the levy of the execution. *Wells* v. *Bosser*, 570.

18. ASSIGNMENT OF — VALIDITY OF EXECUTION SALE. — Where the holder of a valid judgment which is a lien on real estate attempts to assign it, and the assignee afterwards takes out execution, and at the sale of the land thereunder becomes the purchaser, paying the full amount of the judgment with the full knowledge and consent of the assignor, third parties cannot question the validity of the assignment and subsequent proceedings on the ground that the assignment and notice of sale were insufficient. *Id.*

19. JUDGMENT, WHEN PASSES TITLE. — A judgment against a defendant for the value of horses which have strayed and become lost by his negligence, of itself, when paid, passes title to the horses to him, without any provision to that effect in the judgment. *St. Louis etc. R'y Co.* v. *McKinney*, 54.

See ESTOPPEL, 4–6; EXECUTIONS, 3; MANDAMUS, 1, 2; PLEADING, 9; RECEIVERS, 3.

JUDICIAL SALE.

1. CONFIRMATION OF, IN DISCRETION OF COURT. — In judicial sales the court is the vendor, and it may confirm or refuse to confirm a sale made under its order, in the exercise of a sound judicial discretion. The court may confirm such sale upon the condition that the purchaser shall increase his bid to a certain amount. *State Nat. Bank* v. *Neal*, 185.

2. SALE EN MASSE NOT AUTHORIZED BY EXECUTION WHEN. — Where a decree orders each of the defendants in a suit to pay his proportionate share of the costs and of a solicitor's fee, and awards execution to enforce payment, this does not authorize the sale of the property of the several defendants *en masse*. The amount awarded against each must be made out of his property, so that he may be able to redeem without paying the entire debt. *Brown* v. *Duncan*, 545.

See EXECUTIONS, 4; JUDGMENTS, 2; STATUTE OF LIMITATIONS.

JURISDICTION.

See ACTIONS, 3; APPEAL AND ERROR, 5; CONTEMPT, 2; CORPORATIONS, 19–22; COURTS; JUDGMENTS, 6; PROCESS, 1, 2; TRESPASS, 4.

JURY AND JURORS.

See NEGLIGENCE, 1–3; TRIAL, 1, 2.

JUSTICE OF PEACE.

See CRIMINAL LAW, 2; MANDAMUS, 1, 2.

LANDLORD AND TENANT.

1. NOTICE, WHEN SUFFICIENT TO EXTEND TERM OF LEASE. — Where a lease for a term of five years contains a provision for an extension thereof for two years, upon the lessee's giving written notice to the lessor three months before the expiration of the original term of his desire to so extend it, a written notice served by the lessee as prescribed, and stating, in addition, that if the lessor chooses they would regard the lease as extended two years and a half, to which the lessor replies acknowledging the lessee's right to an extension for two years, but refusing to grant the extension for the extra six months, is sufficient to extend the term for the two years. *Chamberlain* v. *Dunlop*, 807.

2. SURRENDER OF LEASE, WHAT IS NOT. — An original lease is not surrendered by the delivery to the lessee of a new lease of the same premises, which does not give to him the interest for which he contracted and which he thought he was acquiring, and where no entry is ever made under the new lease, the property thereby demised having been destroyed by fire before the time arrived at which by its terms it was to become operative. *Id.*

3. LESSEE MAY TESTIFY AS TO VALUE OF LEASE WHEN. — A lessee suing to recover damages for the breach of a covenant to rebuild, contained in his lease, may testify as to the value of the lease for the time he would have been in possession after the premises were rebuilt and before the lease expired. *Id.*

4. LIABILITY OF OWNER OF PREMISES WHO LEASES THEM KNOWING OF NUISANCE THEREON. — Where the owner of premises knows, or can by the exercise of reasonable care ascertain, that they have upon them a nuisance dangerous to the public or to an adjoining owner, it is his duty to abate it before he leases the premises; and if he leases them without doing so, he will be liable to respond in damages to any one injured by and in consequence of the nuisance, even though he did not himself create the nuisance. And this rule applies also to a tenant who sublets the premises, knowing or being chargeable with knowledge of the existence of the nuisance. *Timlin* v. *Standard Oil Co.*, 845.

5. MERE ACCEPTANCE OF LEASE DOES NOT RENDER TENANT LIABLE FOR NUISANCE. — A lessee of premises does not become liable for a nuisance existing thereon merely by accepting the lease, but to render him liable it must be shown that he had notice of its existence, or that enough time had elapsed in which he could, by the exercise of proper care, have obtained such knowledge. *Id.*

See ADVERSE POSSESSION, 4–7; DAMAGES, 1; TRESPASS, 1–3.

LARCENY.

See CRIMINAL LAW, 12.

LEGISLATURE.

LEGISLATURE CANNOT DELEGATE TO AN EXECUTIVE BODY THE POWER TO IMPOSE A PENALTY for the violation of a rule or regulation, though the legislature fixes the maximum of such penalty. *Harbor Commissioners* v. *Redwood Co.*, 321.

See MARRIAGE AND DIVORCE, 2.

LEVEES.

See LICENSE, 3.

LIBEL AND SLANDER.

1. NEWSPAPER PUBLICATION CHARGING A COLLUSION AND COMBINATION between a brick company and its subcontractors and the subordinate engineers of a construction company, or some of them, to cheat, swindle, and defraud the construction company, is libelous, and one of such subordinate engineers may maintain an action thereon, upon proof that the publication referred especially to and was specially defamatory of him. *Hardy* v. *Williamson*, 479.

2. LIBELOUS NEWSPAPER PUBLICATION AGAINST "SUBENGINEERS, OR SOME OF THEM," will support an action by one of them, notwithstanding the disjunctive form in which the words are used, as it may be shown at the trial that the expression "some of them" was used because the writer did not mean that all were guilty, but that the plaintiff alone, or with others, was guilty. *Id.*

3. NEWSPAPER PUBLICATION CHARGING MORAL TURPITUDE is libelous and actionable, although no specific crime is charged. Charges made of one in reference to his trade, office, or profession, calculated to injure him therein, are actionable, and no special damages are necessary to support the action. *Id.*

4. EVIDENCE. — In an action of libel founded on a newspaper article, an editorial in another paper upon the same subject-matter as that in suit, but not shown to be the basis therefor, or to have any connection therewith, is inadmissible, and error committed in admitting it is not cured by subsequently striking it out. *McDuff* v. *Detroit etc. Co.*, 672.

5. EVIDENCE OF SPECIAL DAMAGES. — The fact that a published article is libelous *per se* does not, of itself, render evidence of special damages, or of specific acts of others towards plaintiff in consequence of the publication, admissible, unless alleged in the complaint. *Id.*

6. MEASURE OF DAMAGES. — Under an allegation of general damages only in libel, the issue is, What damages has the plaintiff suffered generally in the community where he is known by the publication of the libelous article? and not what he has suffered in individual instances, where those who have known him have treated him differently from what they did before. *Id.*

7. MEASURE OF DAMAGES. — In the absence of an allegation of special damage in libel, plaintiff is presumed to rest content with such damages as are the natural result of the libelous publication upon his character, reputation, and feelings, without proof of specific facts; and such damages, coupled with damages for the malice or want of malice with which the article was published, are all that he is entitled to recover or prove, unless special damages are alleged. *Id.*

8. HOUSE OF ILL-FAME. — Charging one with keeping a house of ill-fame is actionable *per se*. *Posnett* v. *Marble*, 126.

9. CHARGE OF CRIME ACTIONABLE PER SE. — Words charging a crime involving moral turpitude, and subjecting the offender to corporal punishment, are actionable *per se*. The place of confinement is immaterial. *Id.*

10. PRIVILEGED COMMUNICATION. — A statement made to a post-office inspector, in reply to an inquiry by him in reference to an applicant for a post-office appointment, is so far privileged as to protect the party making the communication in good faith, from an honest motive, and without actual malice. *Id.*

11. SUFFICIENCY OF COUNT. — A count charging slander by accusing plaintiff of keeping a house of ill-fame is sufficient without an averment that plaintiff had a house. *Id.*

12. PROOF OF WORDS ALLEGED. — In slander, the plaintiff need only prove the words alleged substantially as laid. He need not prove the precise words. *Id.*

13. WORDS SUPPORTING INNUENDO. — The words "She keeps a common open house; she is nothing but a whore, anyway," — will support the innuendo that she keeps a house of ill-fame. *Id.*

14. WORDS NOT SUPPORTING INNUENDO. — The words "My mail won't come into a whore-house," spoken of and concerning plaintiff, to prevent her from obtaining an appointment as post-mistress, will not support the innuendo that she keeps a house of ill-fame, without the further averment that she had a house. *Id.*

15. WORDS NOT SUPPORTING INNUENDO. — Words charging plaintiff with keeping a "stinking place"; that her character is not in good standing; and that "she is in the habit of having men come to her house and lounge around and stay for hours at a time," — will not support the innuendo that she keeps a house of ill-fame. *Id.*

16. WORDS NOT SUPPORTING INNUENDO. — Words charging a plaintiff in slander with having a venereal disease will not support the innuendo that she keeps a house of ill-fame. *Id.*

LICENSE.

1. IRREVOCABLE LICENSE, WHAT IS. — An agreement between a land-owner and two other persons that the latter may survey, excavate, and keep in repair a ditch over the lands of the former, which, when completed, should be used by all the parties in irrigating their respective lands, gives the transaction the character of a purchase by the one party, and a sale by the other, of the right of way for a ditch, and if the work has been done, the land-owner cannot recall his consent, fill up the ditch, and thereby deprive the others, or their successors in interest, of the use of the ditch or the waters running therein. *Flickinger* v. *Shaw*, 234.

2. LICENSE TO CONSTRUCT AND MAINTAIN A DITCH BECOMES IRREVOCABLE when the licensee makes improvements or invested capital in consequence of it. *Id.*

3. IF A LICENSE IS GIVEN BY A LAND-OWNER TO BUILD A LEVEE on his lands for the purpose of protecting the land of the builder from overflow, the former, after the levee is built, has no right to revoke the license and destroy the levee. *Grimshaw* v. *Belcher*, 293.

See INJUNCTION, 1.

LIENS.

See CHATTEL MORTGAGE, 6; JUDGMENTS, 17; MORTGAGE, 1; SALE, 4; VENDOR AND PURCHASER, 16-20.

LIMITATIONS OF ACTIONS.

1. STATUTE OF LIMITATIONS BEGINS TO RUN FROM MATURITY OF THE DEBT sought to be recovered, and not from the date when it is created. *Westverton* v. *Taylor*, 521.

2. STATUTE OF LIMITATIONS, CESTUI QUE TRUST, WHEN BARRED BY. — Where a trustee holding the legal title to land in fee is barred by the statute of

limitations, all the *cestuis que trustent* are barred, whether they are entitled in possession or in remainder, vested or contingent, and whether they are *sui juris* or under disability. *Chase* v. *Cartright*, 207.

3. LIMITATION OF FIVE YEARS FOR RECOVERY OF LANDS SOLD AT JUDICIAL SALE NOT APPLICABLE WHEN. — A right of action against a purchaser at a judicial sale which accrues to the party claiming it more than five years after the date of the sale is not barred by the five years' limitation of the statute requiring all persons to bring suits against purchasers at judicial sales within five years after the date of the sale, or be thereafter barred. This provision applies to the enforcement of only such rights to recover the land sold as can be enforced in an action brought within that time. *Kessinger* v. *Wilson*, 220.

4. LOSS OF ONE OF TWO CONCURRENT RIGHTS OF ENTRY DOES NOT IMPAIR THE OTHER. — Where the same person has two separate rights of entry, the loss of one by lapse of time does not impair the other. *Id.*

See ADVERSE POSSESSION, 7; CORPORATIONS, 5.

MALICIOUS PROSECUTION.

1. CONVICTION AND ACQUITTAL AS AFFECTING RIGHT OF ACTION — SUFFICIENCY OF COMPLAINT. — A complaint in malicious prosecution, alleging a conviction before a justice of the peace and an acquittal on appeal, and that the prosecution was malicious and without probable cause, but containing no allegation that the conviction was procured by perjury or subornation of perjury on the part of defendant, or by fraud or collusion, or any improper motive on the part of the justice, is insufficient on demurrer. In such case the conviction is conclusive evidence of probable cause, and exonerates the defendant from liability. *Adams* v. *Bicknell*, 576.

2. RELYING ON ADVICE OF COUNSEL AS PROBABLE CAUSE. — In malicious prosecution the burden of proof is upon the plaintiff to prove want of probable cause, and where the defendant has laid all the facts before counsel, and has acted in good faith upon the advice given, this exonerates him from liability. *Id.*

3. CONVICTION AS PROOF OF PROBABLE CAUSE. — Where a court of competent jurisdiction to try an offense has acted upon all the facts, and has found the defendant guilty, this constitutes probable cause, and conclusively exonerates the prosecuting witness from liability in an action for malicious prosecution, although the conviction has been appealed from and an acquittal had. *Id.*

4. CONVICTION AS PROOF OF PROBABLE CAUSE. — In an action for malicious prosecution, founded upon a conviction below and an acquittal on appeal, the conviction, in the absence of fraud, is conclusive evidence of probable cause, and relieves the defendant from liability. *Id.*

MANDAMUS.

1. MANDAMUS NOT AWARDED WHERE RIGHT IS DOUBTFUL. — A mandamus will never be awarded unless the right to have the thing done which is sought is clearly established. If the right is doubtful, the writ will be refused. *Mobile etc. R. R. Co.* v. *People*, 556.

2. MANDAMUS WILL LIE AGAINST A JUSTICE OF THE PEACE TO COMPEL HIM TO ENTER JUDGMENT, to make correct docket entries in accordance with the facts, and to perform all duties which are ministerial. *State* v. *Engle*, 655.

3. IF A JUSTICE OF THE PEACE enters a judgment of dismissal, he may, by *mandamus*, be compelled to enter judgment in favor of defendant for his costs, and to issue execution thereon. *Id.*

4. MANDAMUS WILL NOT LIE TO COMPEL THE GOVERNOR OF A STATE TO ISSUE A COMMISSION to one who has been elected to a public office. *Henry* v. *State*, 663.

5. MANDAMUS WILL NOT ISSUE TO CONTROL THE GOVERNOR OF A STATE in the matter of the discharge of any of the duties pertaining to his office as governor. Therefore, if he decides not to issue a commission to one who has been elected to a public office, his decision is final. *Id.*

MARRIAGE AND DIVORCE.

1. DIVORCE — CHRONIC DEMENTIA AS GROUND FOR. — A statute making chronic mania or dementia, existing for ten years or more, one of the grounds upon which divorces may be granted is constitutional. *Hickman* v. *Hickman*, 148.

2. DIVORCE — POWER OF LEGISLATURE TO PROVIDE GROUNDS FOR. — The legislature may authorize the granting of divorces by the courts for any causes deemed by it sufficient, though due to the misfortune of the defendant. *Id.*

See ESTOPPEL, 4–6.

MARRIED WOMEN.

See EQUITY, 1; ESTOPPEL, 3; HUSBAND AND WIFE.

MASTER AND SERVANT.

1. HIRER OF ANOTHER SERVANT, WHEN BECOMES MASTER. — Where a master has hired his servant to another, giving the latter the complete and absolute control and direction of the servant, with the exclusive right to discharge him, put another in his place, or put him at other work, the original master is not liable for his negligence, although he receives pay for the work so done by him, as he is for the time being the servant of the hirer. *Brown* v. *Smith*, 456.

2. ROAD-MASTER OF RAILWAY COMPANY HAS NO IMPLIED AUTHORITY TO BIND IT TO PAY ITS EMPLOYEES' BOARD. — It is not incident to the operation of a railroad to board the company's employees; and it is not within the apparent scope of the authority of its road-master to bind the company to pay for the board of its employees. *St. Louis etc. R'y Co.* v. *Bennett*, 187.

3. DUTY OF MASTER — NEGLIGENCE OF SERVANT WHEN NEGLIGENCE OF MASTER. — A railway company is bound to furnish safe machinery and appliances for use by its employees, and a failure to use ordinary and reasonable care in this respect makes it liable for injuries to its servants caused by such neglect; nor can the company relieve itself of this duty by charging its servants with its performance. The neglect of such servant is the neglect of the master. *International etc. R'y Co.* v. *Kernan*, 52.

4. NEGLIGENCE OF SERVANT WHEN NEGLIGENCE OF MASTER. — The negligence of a car inspector is the negligence of the railway company, in respect to a brakeman in its employ injured while in the performance of his duty by a defective car and coupling apparatus; and it is immaterial that the defective car used by the company belonged to another company. *Id.*

5. MASTER'S LIABILITY FOR VIOLENCE OF SERVANT. — A railroad company is liable for the unlawful violence and misbehavior of its employees, both on the cars and at the office of the company. The rule is here applied to a battery committed by a conductor upon a passenger on the car, and repeated afterwards at the company's office. *Savannah St. R. R. Co.* v. *Bryan*, 464.

6. MASTER NOT BOUND TO REPAIR DEFECTS IN APPLIANCES FURNISHED TO SERVANT WHEN. — It is not the duty of a master to repair defects in appliances used by his servants, arising in the daily use of such appliances, for which proper and suitable materials are supplied, and which may easily be remedied by the servants themselves, and are not of a permanent character or requiring the help of skilled mechanics. It is a duty of the servants to repair such defects when they arise, with the materials furnished, especially where the necessity springs from their daily use of the appliance, occurs at different and unknown periods in their service, and is open to their observation in the absence of the master. *Oregan* v. *Marston*, 854.

7. SERVANT AUTHORIZED TO RELY ON MASTER'S FURNISHING SAFE APPLIANCES. — The burden of furnishing safe machinery, appliances, surroundings, etc., is upon the master; and while he is not to be held liable for defects and dangers of which the servant is fully informed, yet the servant is authorized to rely upon the acts of the master in that respect, and is under no primary obligation to investigate and test the fitness and safety of the machinery, surroundings, etc., in the absence of notice that there is something wrong in that respect, especially where the servant's duties require constant attention to other matters. *Chicago etc. R. R. Co.* v. *Hines*, 515.

8. ALLEGATION IN DECLARATION OF DUE CARE NEGATIVES NEGLIGENCE ON PLAINTIFF'S PART. — In an action against a master to recover damages for personal injuries alleged to have been sustained by a servant through the negligence of the master, an allegation in the declaration that the servant used due care negatives negligence on his part, and, by implication, that he had knowledge of the defects by reason of which he was injured; and the jury, by finding the master guilty of negligence, impliedly find that the servant had no knowledge of such defects, and was not guilty of contributory negligence. Besides, it is a matter of defense that the servant knew of the defects which caused his injury, and such knowledge will not be presumed. *Id.*

See CORPORATIONS, 1; INNS AND INNKEEPERS, 1; SHIPPING, 1.

MAXIMS.

PARTIES IN PARI DELICTO are left without remedy against each other. *Kirkpatrick* v. *Clark*, 531.

MECHANIC'S LIEN.

1. A MECHANIC TO WHOM ANY ARTICLE IS INTRUSTED to alter or repair, and who furnishes material and labor in its alteration and repair, has a lien thereon which is enforceable under sections 5303 and 5304 of the Revised Statutes of Indiana. *Watts* v. *Sweeney*, 615.

2. MECHANIC'S LIEN IN THIS STATE RELATES TO THE DAY WHEN MATERIALS WERE COMMENCED TO BE FURNISHED by the lien-holder, and hence has precedence over a mortgage executed subsequently to that time, though

given to secure a balance due on the property for the purchase price thereof. *Avery* v. *Clark*, 272.

3. UNDER THE CODE OF CALIFORNIA, if a building is constructed on lands with the knowledge of a person having or claiming any interest therein, such interest is subject to such lien, unless he gives notice that he will not be responsible, and if he afterwards makes a conveyance of the property, taking a mortgage to secure the payment of part of the purchase price, his mortgage is subordinate to the mechanic's lien. *Id.*

4. MORTGAGE AND MECHANIC'S LIEN, PRECEDENCE BETWEEN. — If the mortgagee of a railway and the rolling stock thereon permits a locomotive and tender to remain in the possession and use of the mortgagor, and through such use it becomes in need of alterations and repairs, whereupon it is intrusted to a mechanic to alter and repair, he has a lien thereon for the amount due him which has precedence over such mortgage. *Watts* v. *Sweeney*, 615.

MERGER.

See JUDGMENTS, 3.

MILLS AND MILL-DAMS.

CONTRIBUTION FOR MAINTENANCE OF DAM. — In an action to recover the cost of rebuilding a dam from one who is liable to contribute to its maintenance, recovery may be had in proportion to the sum actually expended in rebuilding in a prudent and diligent manner under the circumstances, although a man of experience with ample means might, under favorable circumstances, have built it for less. *Webb* v. *Laird*, 121.

MINES AND MINING.

1. TERM "MINING CLAIM" MEANS a parcel of mineral land containing precious metals, and is often used in mining parlance as synonymous with the term "location," which means the act of appropriating a mining claim upon the public domain, according to established law or rules. *McFeters* v. *Pierson*, 288.

2. MINING CLAIM ON PUBLIC DOMAIN IS REAL PROPERTY, and the subject of complete ownership as a claim, and the locator thereof, or his successor in interest, having fully complied with the terms prescribed by Congress for acquiring title to mineral lands, is, so long as he continues such compliance, the owner of the claim for all practical purposes. He is the owner before as well as after the issuance of the patent, and is entitled to the exclusive possession as against the whole world. *Id.*

3. TITLE AND POSSESSION, HOW PLEADED. — In a civil action for injury to a mining claim, an allegation by plaintiff of ownership and actual possession thereof, describing the same according to the location certificate thereof duly recorded, without alleging ownership in fee, or that a government patent has issued therefor, does not import ownership in fee, nor compel proof of title by patent from the United States. *Id.*

4. "MINING CLAIM," ACTUAL POSSESSION NOT NECESSARY TO MAINTAIN ACTION FOR INJURY TO. — To maintain a civil action for injury to a mining claim, it is not necessary that the claimant should reside on the premises, that it should be inclosed or cultivated, nor that he should have a *pedis possessio* thereof. Having made and marked the discovery, filed his certificate, and performed and kept up the work necessary to perfect the claim, and having otherwise complied in good

5. MASTER'S LIABILITY FOR VIOLENCE OF SERVANT. — A railroad company is liable for the unlawful violence and misbehavior of its employees, both on the cars and at the office of the company. The rule is here applied to a battery committed by a conductor upon a passenger on the car, and repeated afterwards at the company's office. *Savannah St. R. R. Co.* v. *Bryan*, 464.

6. MASTER NOT BOUND TO REPAIR DEFECTS IN APPLIANCES FURNISHED TO SERVANT WHEN. — It is not the duty of a master to repair defects in appliances used by his servants, arising in the daily use of such appliances, for which proper and suitable materials are supplied, and which may easily be remedied by the servants themselves, and are not of a permanent character or requiring the help of skilled mechanics. It is a duty of the servants to repair such defects when they arise, with the materials furnished, especially where the necessity springs from their daily use of the appliance, occurs at different and unknown periods in their service, and is open to their observation in the absence of the master. *Cregan* v. *Marston*, 554.

7. SERVANT AUTHORIZED TO RELY ON MASTER'S FURNISHING SAFE APPLIANCES. — The burden of furnishing safe machinery, appliances, surroundings, etc., is upon the master; and while he is not to be held liable for defects and dangers of which the servant is fully informed, yet the servant is authorized to rely upon the acts of the master in that respect, and is under no primary obligation to investigate and test the fitness and safety of the machinery, surroundings, etc., in the absence of notice that there is something wrong in that respect, especially where the servant's duties require constant attention to other matters. *Chicago etc. R. R. Co.* v. *Hines*, 515.

8. ALLEGATION IN DECLARATION OF DUE CARE NEGATIVES NEGLIGENCE ON PLAINTIFF'S PART. — In an action against a master to recover damages for personal injuries alleged to have been sustained by a servant through the negligence of the master, an allegation in the declaration that the servant used due care negatives negligence on his part, and, by implication, that he had knowledge of the defects by reason of which he was injured; and the jury, by finding the master guilty of negligence, impliedly find that the servant had no knowledge of such defects, and was not guilty of contributory negligence. Besides, it is a matter of defense that the servant knew of the defects which caused his injury, and such knowledge will not be presumed. *Id.*

See CORPORATIONS, 1; INNS AND INNKEEPERS, 1; SHIPPING, 1.

MAXIMS.

PARTIES IN PARI DELICTO are left without remedy against each other. *Kirkpatrick* v. *Clark*, 531.

MECHANIC'S LIEN.

1. A MECHANIC TO WHOM ANY ARTICLE IS INTRUSTED to alter or repair, and who furnishes material and labor in its alteration and repair, has a lien thereon which is enforceable under sections 5303 and 5304 of the Revised Statutes of Indiana. *Watts* v. *Sweeney*, 615.

2. MECHANIC'S LIEN IN THIS STATE RELATES TO THE DAY WHEN MATERIALS WERE COMMENCED TO BE FURNISHED by the lien-holder, and hence has precedence over a mortgage executed subsequently to that time, though

given to secure a balance due on the property for the purchase price thereof. *Avery* v. *Clark*, 272.

3. UNDER THE CODE OF CALIFORNIA, if a building is constructed on lands with the knowledge of a person having or claiming any interest therein, such interest is subject to such lien, unless he gives notice that he will not be responsible, and if he afterwards makes a conveyance of the property, taking a mortgage to secure the payment of part of the purchase price, his mortgage is subordinate to the mechanic's lien. *Id.*

4. MORTGAGE AND MECHANIC'S LIEN, PRECEDENCE BETWEEN. — If the mortgagee of a railway and the rolling stock thereon permits a locomotive and tender to remain in the possession and use of the mortgagor, and through such use it becomes in need of alterations and repairs, whereupon it is intrusted to a mechanic to alter and repair, he has a lien thereon for the amount due him which has precedence over such mortgage. *Watts* v. *Sweeney*, 615.

MERGER.

See JUDGMENTS, 3.

MILLS AND MILL-DAMS.

CONTRIBUTION FOR MAINTENANCE OF DAM. — In an action to recover the cost of rebuilding a dam from one who is liable to contribute to its maintenance, recovery may be had in proportion to the sum actually expended in rebuilding in a prudent and diligent manner under the circumstances, although a man of experience with ample means might, under favorable circumstances, have built it for less. *Webb* v. *Laird*, 121.

MINES AND MINING.

1. TERM "MINING CLAIM" MEANS a parcel of mineral land containing precious metals, and is often used in mining parlance as synonymous with the term "location," which means the act of appropriating a mining claim upon the public domain, according to established law or rules. *McFeters* v. *Pierson*, 388.

2. MINING CLAIM ON PUBLIC DOMAIN IS REAL PROPERTY, and the subject of complete ownership as a claim, and the locator thereof, or his successor in interest, having fully complied with the terms prescribed by Congress for acquiring title to mineral lands, is, so long as he continues such compliance, the owner of the claim for all practical purposes. He is the owner before as well as after the issuance of the patent, and is entitled to the exclusive possession as against the whole world. *Id.*

3. TITLE AND POSSESSION, HOW PLEADED. — In a civil action for injury to a mining claim, an allegation by plaintiff of ownership and actual possession thereof, describing the same according to the location certificate thereof duly recorded, without alleging ownership in fee, or that a government patent has issued therefor, does not import ownership in fee, nor compel proof of title by patent from the United States. *Id.*

4. "MINING CLAIM," ACTUAL POSSESSION NOT NECESSARY TO MAINTAIN ACTION FOR INJURY TO. — To maintain a civil action for injury to a mining claim, it is not necessary that the claimant should reside on the premises, that it should be inclosed or cultivated, nor that he should have a *pedis possessio* thereof. Having made and marked the discovery, filed his certificate, and performed and kept up the work necessary to perfect the claim, and having otherwise complied in good

faith with the requirements essential to a valid and subsisting location, and being in the actual and lawful control of the claim for the purpose of working and developing the same, he is entitled to the exclusive possession and enjoyment thereof as against the world, and may maintain an action against a trespasser for an injury to the timber growing thereon, as well as to the mineral product of the soil itself. *Id.*

5. AVERMENT OF CITIZENSHIP NOT NECESSARY IN ACTION TO RECOVER AGAINST TRESPASSER ON MINING CLAIM. — In an action to recover from a trespasser for cutting timber on a mining claim, the plaintiff need not allege his citizenship in the first instance, but may rely upon an allegation of possession or title as against the wrong-doer without title or right of possession. *Id.*

6. NOTICE NOT CONSPICUOUSLY POSTED. — If the proceedings for locating and working a mining claim are in all respects regular, they will not be held void because notice of the location was written on a paper folded with the writing inside, and placed upon a mound of rocks, underneath two flat stones, with only the margin of the paper exposed to view, though the law requires that such notice be posted conspicuously in a conspicuous place upon the claim, if the object in posting the notice as it was posted was, not to conceal, but to protect it from the weather. *Donahue* v. *Meister*, 283.

See PARTNERSHIP, 2.

MINORS.

See INFANCY.

MISTAKE.

See ADVERSE POSSESSION, 1, 6; BANKS AND BANKING, 8, 14, 15; BOUNDARIES, 4, 5; CARRIERS, 9, 10.

MONOPOLY.

See CARRIERS, 1, 2, 27, 28.

MORTGAGES.

1. MORTGAGE BY ABSOLUTE DEED AND DEFEASANCE — EFFECT OF RECORD OF DEED ALONE — JUDGMENT LIEN AS AGAINST PURCHASER FROM MORTGAGEE WITH NOTICE. — The record of a deed absolute in form, intended as a mortgage, will protect the rights of the grantee, although he has failed to record a defeasance, in the form of a contract to reconvey, which he has executed to the grantor; but a judgment properly docketed against the grantor is a lien upon his equity of redemption, as against a subsequent purchaser from the grantee with knowledge of the facts. *Marston* v. *Williams*, 719.

2. MORTGAGEE MAY BE GIVEN THE RIGHT TO THE POSSESSION of the mortgaged property as additional security for his debt, and this may be done by parol agreement, and the right to retain possession is not dependent on the right to foreclose the mortgage, but solely on the existence of the debt. *Spect* v. *Spect*, 314.

3. LAND IS HELD IN PLEDGE WHEN A MORTGAGOR GIVES A MORTGAGEE POSSESSION as additional security for his debt, and the pledgee has the right to retain possession until the debt is paid, though the statute of limitations has barred all remedy for its recovery. *Id.*

4. MORTGAGEE IN POSSESSION IS ENTITLED TO RETAIN SUCH POSSESSION UNTIL HIS DEBT IS PAID, and cannot be deprived thereof by an action of ejectment, although the statute of limitations has barred his right to maintain an action to enforce the debt. *Id.*

5. IF A MORTGAGEE OF MACHINERY UPON WHICH, THROUGH USE, repairs and alterations will become necessary leaves it in the possession of the mortgagor to be used by him, it will be presumed that they contemplated that repairs thereon would become necessary, and that the mortgagor was authorized, if necessary, to intrust it to a mechanic for repairs; and when it is so intrusted, the mechanic has a lien thereon paramount to the lien of the mortgage for materials and labor furnished in such repairs. *Watts* v. *Sweeney*, 615.

6. QUIETING TITLE TO PERSONALTY. — Though an original action cannot be maintained to quiet title to personal property, yet when an action is commenced to foreclose a mortgage thereon, one who is made a party defendant may, by a cross-complaint, set up his title to the property, and ask to have his ownership declared and the foreclosure enjoined; and having done so, he cannot be deprived of his right to have his ownership declared by a dismissal of the case as to him. *Id.*

7. A MORTGAGE DEFECTIVELY EXECUTED, or an imperfect attempt to create a mortgage upon specific property, for the purpose of securing a debt, will create a specific lien upon the property intended to be mortgaged. *Peers* v. *McLaughlin*, 306.

8. EQUITABLE MORTGAGE. — MORTGAGE EXECUTED BY A FATHER ON BEHALF OF HIMSELF AND HIS CHILDREN, when he did not have authority to execute it for them, is nevertheless enforceable as an equitable mortgage, if it was given as part of the purchase price of property which the mortgagee had sold and conveyed to the father and children pursuant to an agreement that they would give him a mortgage for the unpaid purchase-money. *Id.*

9. SUBROGATION — PURCHASER AT VOID FORECLOSURE SALE. — Where property sold under a void foreclosure of a mortgage thereof has been purchased by one at sheriff's sale, and the purchase-money applied to the payment of the mortgage, and the sale and purchase are subsequently set aside and declared void, the purchaser may be subrogated to all the rights which the mortgagee originally had. *Dutcher* v. *Hobby*, 444.

10. MORTGAGE IS NOT PAID BY THE PURCHASE OF THE MORTGAGED PREMISES BY THE MORTGAGEE at the foreclosure sale thereof, and an insurance made payable to him therefor continues in force after such sale. *National Bank* v. *Union Ins. Co.*, 324.

11. MORTGAGE IS NOT FORECLOSED UNTIL THE MORTGAGOR'S RIGHT OF REDEMPTION IS CUT OFF. *Id.*

12. FORECLOSURE. — A third mortgagee, who is made a defendant in suits to foreclose the prior mortgages, and who, after foreclosure and the expiration of the equity of redemption, acquires an equitable interest in the property by agreement with the owner of the title, does not thereby reinstate his mortgage as a lien upon the property for the benefit of a holder of the notes secured thereby, which he has transferred. *Soules* v. *Hall*, 101.

See CHATTEL MORTGAGES; EJECTMENT, 3; INSURANCE, 8, 9; MECHANIC'S LIEN, 4; TAXATION, 1.

MUNICIPAL CORPORATIONS.

1. CONTRACT ULTRA VIRES — LEGALITY OF. — A contract made by a municipal corporation, although *ultra vires*, is not illegal if not prohibited by its charter. *City of St. Louis* v. *Davidson*, 764.

2. CONTRACT ULTRA VIRES — ESTOPPEL. — A contract made by a city for the services of prisoners in its work-house to a private person, although *ultra vires*, is not illegal if not prohibited by its charter; and while it may successfully interpose the plea of *ultra vires* when sued upon such contract, the party contracting with it cannot set up such plea to escape liability under the contract. *Id.*

3. CONTRACT ULTRA VIRES — ESTOPPEL. — A party contracting with a city under a contract which is *ultra vires*, but not prohibited, is estopped, when sued upon the contract, from setting up the plea of *ultra vires* to escape liability and to enable him to retain benefits received under the contract. *Id.*

4. POWER TO CONVEY. — The capacity of a municipal corporation to take, and its power to convey, property of all kinds differs in no essential particular from the capacity and power of a natural person under like circumstances. *State* v. *Laclede G. Co.*, 789.

5. MUNICIPAL CORPORATION MAY MAKE PENAL ACT WHICH IS ALREADY OFFENSE AGAINST STATE. — A municipal corporation has power to make penal an act which has already been made so by a state statute; and when this is done, such act becomes a separate offense against the state and the municipality. In that case, the penalty imposed by the municipality is superadded to that fixed by the general law on account of the additional wrong done to it, and the wrong-doer is not twice punished for the same offense. *Van Buren* v. *Wells*, 214.

6. ORDINANCES, POWER OF MUNICIPAL CORPORATIONS TO PASS. — Under statutes expressly giving to municipal corporations "power to make and publish such by-laws and ordinances, not inconsistent with the laws of the state, as to them shall seem necessary to provide for the safety, preserve the health, promote the prosperity, and improve the morals, order, comfort, and convenience of such corporations and the inhabitants thereof," ordinances punishing disturbances of the peace, the carrying of concealed weapons, and the keeping open of saloons on Sunday are a proper exercise of the power conferred, and are therefore valid. *Id.*

7. ORDINANCE VOID IN PART IS VOID ALTOGETHER, where all its parts are connected with and essential to each other. *State* v. *Webber*, 920.

8. ORDINANCE — SUPPRESSION OF HOUSES OF ILL-FAME. — An ordinance enacted by a municipal corporation providing that the permitting of prostitution by the owner or occupant of a house shall constitute him the keeper of a house of ill-fame, and declaring what shall constitute such house, and establishing a rule of evidence to determine the question, is void, and not authorized under a general power to enact ordinances for the government of the corporation, and to abate or prevent nuisances. *Id.*

9. ORDINANCE — SUPPRESSION OF HOUSE OF ILL-FAME. — Under express power in a municipal corporation to suppress houses of ill-fame, the city has no power to enact an ordinance that persons not guilty of a nuisance under established principles of law shall be deemed guilty of keeping houses of ill-fame, and to prescribe new rules of evidence to be adopted on the trial. *Id.*

10. ORDINANCE — SUPPRESSION OF HOUSES OF ILL-FAME. — Under general power in a municipal corporation to suppress houses of ill-fame, an ordinance forbidding owners from renting their houses to others for the purpose of prostitution, or with knowledge that they were to be so used, is valid; but such general power does not authorize the city to declare, by ordinance, that a certain house is a house of ill-fame, or to define and declare what is such a house. *Id.*

11. ORDINANCE GRANTING GAS PRIVILEGES. — A city ordinance granting to a gas company, its successors and assigns, the privilege of furnishing gas to a city and to consumers for a certain period, and providing that such company may transfer all its rights, property, and franchises to any organized gas company within the state which will file a written acceptance of the ordinance and give a bond to perform all the agreements of the original company, is not void on the ground that the time named therein extends beyond the termination of the original company's existence. *State* v. *Laclede G. Co.*, 789.

12. ORDINANCE GRANTING GAS PRIVILEGES AND FIXING PRICE. — Where a city passes an ordinance granting to a gas company the privilege of manufacturing and supplying gas, and also fixing the maximum price thereof, upon the acceptance of the ordinance by the gas company the city cannot subsequently reduce the price of gas below that fixed by the ordinance. *Id.*

13. ORDINANCE, WHEN UNREASONABLE. — MUNICIPAL ORDINANCE PERMITTING A FINE NOT exceeding one thousand dollars to be imposed as a penalty for visiting a house of ill-fame, and also an imprisonment not exceeding six months, is unreasonable, not in harmony with the laws of the state, and therefore void, when those laws do not prescribe any penalty for this offense, and make the penalty for living in and about such a house imprisonment not to exceed ninety days, and for the keeping of such a house imprisonment not exceeding six months, or a fine not exceeding five hundred dollars, or both. *In re Ah You*, 280.

14. PUBLICATION OF MUNICIPAL ORDINANCE, BURDEN OF PROOF OF. — In a prosecution for the violation of a municipal ordinance, the burden is on the defendant to prove that the ordinance was not published in the manner prescribed by the statute. *Van Buren* v. *Wells*, 214.

15. VIOLATION OF VOID MUNICIPAL ORDINANCE is not a criminal offense. *State* v. *Webber*, 920.

16. LIABILITY FOR DEFECTS IN STREETS. — Where the charter imposes no liability on a municipal corporation for damages sustained by individuals upon its streets and highways in consequence of defects therein, such defects are not actionable. *Bates* v. *Rutland*, 95.

17. LIABILITY FOR NEGLIGENCE OF OFFICERS. — The trustees and street commissioner of a municipal corporation, which is bound by law to maintain the streets and highways within its limits, are public officers, and act as such in locating and using a stone-crusher in the highway outside the city limits for the purpose of crushing stone for the construction and repair of its streets. In such case, the corporation is not liable for the negligence of such officers. *Id.*

18. LIABILITY FOR NEGLIGENCE OF OFFICERS. — The officers of a municipal corporation engaged in the public work of repairing its streets are public officers, and an action will not lie against the city for their negligent acts in performing such work. *Id.*

19. LOCAL ASSESSMENTS FOR IMPROVEMENTS — INJUNCTION TO PREVENT COLLECTION OF. — The expense of local improvements in a town or city may be met by local assessments, in whole or in part, and equity will not enjoin the collection of such assessments except under special circumstances, such as leave the complainant without any remedy at law, and bring his case under some of the recognized heads of equity jurisdiction, or where it is clear that the tax has been imposed without authority and is absolutely void. *Murphy* v. *Mayor etc.*, 345.

20. ILLEGAL MUNICIPAL TAX — REMEDY OF LAND-OWNER. — An owner of property seized or sold under execution for the collection of a municipal tax, the illegality of which appears from the face of the proceedings, has an adequate remedy at law, either by paying the tax under protest and bringing an action against the city to recover it back, or by action of trespass to recover damages; or if the property is sold, he may maintain ejectment, or test the validity of the tax by writ of *certiorari*. *Id.*

See EQUITY, 6, 7; GAS COMPANIES; PEDDLERS, 2; TAXATION, 3.

NEGLIGENCE.

1. NEGLIGENCE, WHEN QUESTION FOR JURY. — When the facts are undisputed, and two reasonable and fair-minded persons might draw inferences from them so different that, according to the conclusion of fact reached by one there would be negligence, while that deduced by another would show the exercise of ordinary care, the issue should be submitted to the jury for determination. *Deane* v. *Wilmington etc. R. R. Co.*, 902.

2. NEGLIGENCE, WHEN QUESTION FOR JURY. — In an action against a railroad to recover for personal injury, when it appears that a person, standing on the track at the time that the engine passed going at the rate of twenty miles an hour, could see the party injured three fourths of a mile in front, lying in an apparently helpless condition across the track, it is a question for the jury to determine whether or not the engineer, in the exercise of due diligence, might have discovered, from his elevated position on the engine, the fact that such party was lying helpless across the rails, and by prompt and strenuous effort have saved his life by stopping the train, without imperiling the passengers. In such case, it is also for the jury to determine, with or without the aid of expert testimony, within what distance the train might have been stopped without putting the passengers in jeopardy. *Id.*

3. NEGLIGENCE AS TO UNFASTENED TURN-TABLE — QUESTION FOR JURY. — Whether or not a railway company is guilty of negligence in leaving its turn-table unfastened, thereby injuring a child of tender years, is a question for the jury to determine under all the facts and circumstances of each particular case. *Ilwaco etc. Nav. Co.* v. *Hedrick*, 169.

4. PRACTICE ON FACTS ADMITTED MAKING PRIMA FACIE CASE. — Where facts admitted by stipulation make a *prima facie* case of negligence on the part of defendant, and are unrebutted and undisputed by him, it is the duty of the court to direct the jury to find a verdict for the plaintiff. *Magoffin* v. *Missouri P. R'y Co.*, 798.

5. INDIVIDUAL IS CHARGEABLE WITH KNOWLEDGE OF HIS DUTY. — In the law of personal liability for the consequences of action or non-action, the law charges the individual with a knowledge of his duty. When, therefore, a declaration alleges that it was the duty of an individual or corporation

to do or not to do a given thing, it is necessarily implied from that allegation that the individual or corporation knew that it was his or its duty to do or not to do the given thing. *Chicago etc. R. R. Co.* v. *Hines*, 515.

6. CONTRIBUTORY NEGLIGENCE, WHEN DOES NOT BAR RECOVERY. — When, at the time an injury is inflicted, it might have been avoided by reasonable care and prudence on the part of the defendant, an action will lie for damages, notwithstanding the previous negligence of the plaintiff. *Deans* v. *Wilmington etc. R. R. Co.*, 902.

7. POSTHUMOUS CHILD — RIGHT TO RECOVER FOR INJURY TO PARENT. — Under a statute giving a right of action for damages for injuries causing the death of a person, and providing that "the action shall be for the sole and exclusive benefit of the surviving children of the person whose death shall have been so caused," the word "children" includes a posthumous child, who is equally entitled to the benefit of such action with the other children. *Nelson* v. *Galveston etc. R'y Co.*, 81.

8. POSTHUMOUS CHILD — RIGHT TO RECOVER FOR INJURY TO PARENT. — A posthumous child is entitled to recover damages for the death of his father, resulting from injuries inflicted by the negligence of a railroad company, under a statute giving to the "surviving children" of the deceased a right to maintain an action in such case. *Id.*

9. POSTHUMOUS CHILD — RIGHT TO RECOVER FOR INJURY TO PARENT — STATUTE OF LIMITATIONS. — Where a posthumous child is entitled to recover damages for the death of his father, resulting from injuries inflicted by the negligence of a railroad company, the statute of limitations does not begin to run against him from the time when the cause of action accrued, merely because his mother was capable of commencing suit at that time. *Id.*

10. POSTHUMOUS CHILD — RIGHT TO RECOVER FOR INJURY TO PARENT — JUDGMENT AS ESTOPPEL. — The right of a posthumous child to maintain suit to recover damages for the death of his father, resulting from injuries inflicted by the negligence of a railroad company, is not concluded by a judgment in a suit brought by his mother and another beneficiary against the company, in which the amount of compensation due such child is not included, nor his rights considered. *Id.*

11. STATUTES GIVING RIGHT OF ACTION FOR INJURY RESULTING IN DEATH NOT DISSIMILAR WHEN. — Statutes of two different states, which give a right of action to recover damages for injuries resulting in death, are not dissimilar because by one statute the right of action is given to the widow, while by the other, it is given to the executor or administrator. Although the formal parties are different, the substantial and real parties are identical. *Wooden* v. *Western etc. R. R. Co.*, 803.

12. ACTION TO RECOVER FOR DEATH OF HUSBAND PROPERLY BROUGHT BY WIDOW, AS SUCH, WHEN. — Where the statute of Pennsylvania gives to a widow, in her own right, and as trustee for the children, a right to recover for the death of her husband, an action brought by her in New York to recover for such death, resulting from an injury received in Pennsylvania, is properly brought by her as widow, and not as administratrix, although the New York statute gives the right of action in similar cases to the executor or administrator. *Id.*

13. ACTION TO RECOVER FOR INJURIES RESULTING IN DEATH, RECEIVED IN FOREIGN STATE, WHEN MAINTAINABLE. — An action to recover damages for injuries received in another state, resulting in the death of the

person injured, can be maintained in the state of New York only upon proof that the statutes of such other state give the right of action, and that they are similar to the New York statutes. The statutes of the two states need not, however, be identical in their terms or precisely alike; it is sufficient if they are of similar import and character, founded upon the same general principle, and possessing the same general attributes. *Id.*

See AGENCY, 1, 2; ANIMALS; BANKS AND BANKING, 8; CARRIERS; DAMAGES, 8; HUSBAND AND WIFE, 3, 4; JUDGMENTS, 3, 19; MASTER AND SERVANT, 8; RAILROAD COMPANIES, 1–5, 7–9; TELEGRAPH COMPANIES, 1–3.

NEGOTIABLE INSTRUMENTS.

1. ACCOMMODATION PAPER — LIABILITY OF MAKER AFTER INDORSEMENT. — A note made payable by the maker to himself, and signed by others as accommodation paper, to enable such maker to raise money thereon, and indorsed by him for that purpose, may be enforced, not only as against such maker and indorser, but also as against the other accommodation makers. *Norfolk Nat. Bank* v. *Griffin*, 868.

2. LIABILITY OF GUARANTOR OF PAYMENT. — A guarantor for the payment of a note is liable as upon an absolute promise to pay upon default in payment by the maker. *Jenkins* v. *Wilkinson*, 911.

3. LIABILITY OF GUARANTOR FOR COLLECTION. — A guarantee for the collection of a note is liable as upon a promise to pay upon condition that the payee shall diligently prosecute the maker without success. *Id.*

4. EXTENSION OF TIME FOR PAYMENT OF NOTE — WANT OF CONSIDERATION. — A contract between the payor and payee of a promissory note, entered into after principal and interest are due, and reciting that, in consideration of certain payments at certain times, to avoid litigation, and for other considerations, the time is to be extended to a date mentioned therein, and a pending suit on the note dismissed, is void, as being without consideration, in the absence of extrinsic allegations showing a valid consideration for the contract of forbearance. *Davis* v. *Stout*, 565.

5. EXTENSION OF TIME OF PAYMENT — GUARANTOR. — Where a promissory note is not paid at maturity, and a third person, in consideration of an extension of the time of payment, agrees in writing to guarantee its payment, provided the payee would hold a mortgage as collateral security, such third person thereby becomes a guarantor for the payment of the note upon default by the maker. *Jenkins* v. *Wilkinson*, 911.

6. VOID EXTENSION OF TIME FOR PAYMENT OF NOTE WILL NOT RELEASE SURETY. — A contract for an extension of time in which to pay a promissory note, void for want of consideration, will not release the surety thereon. *Davis* v. *Stout*, 565.

7. INDORSER'S LIABILITY CANNOT BE VARIED BY PAROL. — If an indorser wishes to qualify his liability, he must use apt words therefor, or must in some other manner clearly indicate that his indorsement is limited to a transfer of the paper and nothing more. His liability cannot be changed or varied by parol evidence. *Farwell* v. *St. Paul Trust Co.*, 742.

8. INDORSER'S LIABILITY CANNOT BE VARIED BY PAROL. — The indorsee cannot show, as against the indorser of negotiable paper, that at the time of indorsement it was verbally agreed that presentment for pay-

ment, notice thereof, and of non-payment, need not be made or given. *Id.*

9. RATE OF INTEREST ON NOTE CANNOT BE VARIED BY PAROL. — Where a promissory note fixes the rate of interest thereon, parol evidence is not admissible to show that subsequent to its execution a different rate of interest was agreed upon. *Davis* v. *Stout*, 565.

10. INSOLVENCY OF MAKER DOES NOT EXCUSE PRESENTMENT. — The indorsee must present the note at the place fixed for payment at its maturity, and his failure to do so will not be excused by the insolvency of the maker or his removal from the state. *Farwell* v. *St. Paul Trust Co.*, 742.

NEWSPAPER LIBEL.

See LIBEL AND SLANDER, 1-7.

NEW TRIAL.

WHERE GOOD AND BAD COUNTS ARE JOINED. — In slander, where the several counts charge the utterance of different words upon separate occasions, and a general verdict is returned, a new trial will be granted where, upon motion in arrest of judgment, some of the counts are found good and the others bad. *Pennett* v. *Marble*, 126.

NON-RESIDENTS.

See ACTIONS, 3; ATTACHMENT AND GARNISHMENT, 1, 2.

NOTICE.

See ANIMALS, 1, 2; APPEAL AND ERROR, 1; CARRIERS, 44; CHATTEL MORTGAGES, 4; DEEDS, 5; LANDLORD AND TENANT, 5; MINES AND MINING, 6; PROCESS, 3-5.

NUISANCE.

See LANDLORD AND TENANT, 4, 5.

OFFICE AND OFFICERS.

1. TENURE — ELECTION OF INELIGIBLE SUCCESSOR — QUO WARRANTO. — An incumbent of an office who is entitled to hold for a fixed period, and until his successor is elected and qualified, is entitled to hold over in the event of the election of an ineligible successor, and has such interest in the election that he may question its legality by *quo warranto*. *Taylor* v. *Sullivan*, 729.

2. INELIGIBILITY. — A foreigner, constitutionally ineligible to election to office at the time of his election, for want of declaration of intention to become a citizen, cannot hold the office, although after election, and before the commencement of his term of office, he duly declares such intention. *Id.*

See APPROPRIATIONS, 3; CORPORATIONS; COSTS; DEEDS, 6; MUNICIPAL CORPORATIONS, 17, 18; STATES, 6.

ORDINANCES.

See MUNICIPAL CORPORATIONS, 6-15.

PARENT AND CHILD.

1. LEGITIMACY, HOW ESTABLISHED. — The question of the legitimacy or illegitimacy of the child of a married woman is one of fact, resting on

decided proof as to the non-access of the husband, and the facts must generally be left to the jury to determine. Opportunity of access by the husband, however, is not conclusive evidence of legitimacy. *Woodward* v. *Bliss*, 897.

2. LEGITIMACY — EVIDENCE. — Where, on the issue as to the legitimacy of a child, the evidence tends to prove non-access by the negro husband, and that the wife, a mulatto woman, for three years before the birth of such child continuously lived in adultery with a white man; that the child, by its color, must have been the child of a white man; and that the mother had declared that it was not the child of her negro husband, who was not allowed to come to the house where she lived, — the question of non-access by the husband is for the jury to determine, and the treatment of the child by the white paramour of the wife is competent evidence to corroborate the evidence of non-access. *Id.*

See EVIDENCE, 4; MORTGAGE; NEGLIGENCE, 7–10.

PAROL TESTIMONY.

See EJECTMENT, 1; EQUITY, 5; NEGOTIABLE INSTRUMENTS, 7–9.

PARTIES.

See EQUITY, 2, 3; JUDGMENT, 15.

PARTITION.

1. COMPLAINT IN PARTITION, WHEN SUFFICIENT. — A complaint in partition which alleges that certain persons made parties defendant "claim some right, title, or interest in said premises, the exact nature of which is unknown to the plaintiff, and which is a cloud upon the title to said premises," states a good cause of action against such parties. *Townsend* v. *Bogert*, 835.

2. INTEREST OF PARTY, WHICH IS NOT KNOWN TO PLAINTIFF IN PARTITION, PROPERLY DESCRIBED AS "A CLAIM." — The code requires the rights of the parties to a partition suit to be stated in the complaint, "so far as they are known to the plaintiffs"; but so far as these rights are not known, the interest of a party can only be described as "a claim"; for the plaintiff is not bound to admit the validity of an asserted interest the nature of which he does not know. *Id.*

3. USE OF FIRM MONEY BY PARTNER TO PAY HIS INDIVIDUAL DEBT — BURDEN OF PROOF. — A general partner cannot, without the consent, express or implied, of the other members of the firm, use the funds or property of the firm to pay, settle, or cancel his individual debts; and a creditor receiving such funds or property, having knowledge that they were misappropriated, cannot retain the same, and must assume the burden of proving the consent of the other partners. *Farwell* v. *St. Paul T. Co.*, 742.

See GUARDIAN AND WARD, 1.

PARTNERSHIP.

1. LIABILITY OF ONE HELD OUT TO BE PARTNER. — One not in fact a partner cannot be made liable to third persons on the ground of having been held out as a partner, except when such holding out is done by him or by his consent, and was known to the person seeking to avail himself of it at the time that the contract was made. In such

case, the liability rests on the principle of equitable estoppel. *Hahlo* v. *Meyer*, 752.

2. MINING PARTNERSHIP — RIGHTS OF RETIRING PARTNER. — When the co-tenants of a mine employ a manager to work it and to account to them for the proceeds, thus forming a partnership, after which one of the co-tenants withdraws from such arrangement so far as the manager is concerned, without dissolving the partnership as to the remaining co-tenants, he may maintain an action in his own name, without joining his co-tenants, to recover from such manager his share of the proceeds of the mine subsequently coming into his hands. *Slater* v. *Hass*, 440.

See PARTITION, 2.

PASSENGERS.

See CARRIERS, 1-26.

PAYMENT.

1. NOTHING IS PLEADABLE AS PAYMENT except money, or something agreed to be accepted in lieu thereof, and no subject of set-off can be treated as in any sense payment. *Burton* v. *Willis*, 363.

2. APPLICATION OF. — In respect to the appropriation of payments made by a debtor to a creditor who holds more than one debt against him, the debtor may generally appropriate payments; and if he does not, the creditor may; and if neither appropriates them, the law will make the application according to the justice of the case. The creditor cannot, however, make such application as would, under the circumstances, be inequitable and unjust to the debtor. *Phillips* v. *Herndon*, 59.

3. CONTRACT LAW CHANGING PLACE OF PAYMENT. — The holder of a certificate of indebtedness payable at a designated place cannot be deprived of his rights by a subsequent law or order making it payable elsewhere, and declaring if it is not there presented for payment interest thereon shall cease. The only method in which a debtor can escape liability is by having money ready for the creditor at the place of payment named in the contract. *Carr* v. *State*, 624.

See BANKS AND BANKING.

PEDDLERS.

1. "HAWKERS" AND "PEDDLERS" DEFINED. — A "hawker" is a person who carries about merchandise from place to place for sale, as opposed to one who sells at an established shop. A "peddler" is a person who goes about from house to house selling commodities. *Emmons* v. *City of Lewistown*, 540.

2. BOOK-CANVASSER IS NOT HAWKER OR PEDDLER. — A person who canvasses from house to house, taking orders for the future delivery of books and periodicals or other publications, is neither a hawker nor a peddler, within the meaning of the Illinois statute authorizing municipal corporations to license, regulate, or prohibit hawkers and peddlers. And therefore a city council has no power to pass an ordinance prohibiting such canvassing within the city without first obtaining a license, or imposing a penalty therefor. *Id.*

PENALTIES.

1. PENALTIES ARE NOT DAMAGES, BUT ARE PUNISHMENTS imposed for breach of duty enjoined by law. *Harbor Commissioners* v. *Redwood Co.*, 321.

2. PENALTY, WHAT CONSTITUTES. — A penalty is in the nature of punishment for the non-performance of an act or for the performance of an unlawful act, and involves the idea of punishment, whether enforced by a civil or criminal procedure. *Woolverton* v. *Taylor*, 521.

3. EQUITY NEVER ENFORCES EITHER A PENALTY OR A FORFEITURE. — Where, therefore, a court decides that a certain liability created by statute can be enforced only in a court of equity, it, in effect, decides that the suit brought to enforce such liability is not for the recovery of a penalty. *Id.*

See CARRIERS, 45; CORPORATIONS, 5; LEGISLATURE; MUNICIPAL CORPORATIONS, 5; STATUTES, 1.

PHYSICIANS AND SURGEONS.

See INSURANCE, 13, 14.

PLEADING.

1. COMPLAINT IS NOT DEMURRABLE BECAUSE IT ASKS SOME RELIEF THAT CANNOT BE GRANTED. *Townsend* v. *Bogert*, 835.

2. PLEADINGS — VARIANCE. — A complaint alleging that a vendor obligated himself to convey land "in fee-simple by warranty deed" may be supported by title bonds reciting that he would convey the land "by good and valid deed or deeds in common form." This does not constitute a variance, as a good and valid deed in common form is, in legal effect, a warranty deed. *Phillips* v. *Herndon*, 59.

3. PROPER AMENDMENT TO COMPLAINT. — An amendment curing a defect in a complaint in failing to allege a waiver of a provision in an insurance policy, that a loss should not be payable until sixty days after proof thereof, does not state a new cause of action. *California Ins. Co.* v. *Gracey*, 376.

4. AMENDMENT TO DECLARATION which brings in no new party and no new cause of action into the suit is properly allowed. *Williamson* v. *Johnson*, 117.

5. CROSS-COMPLAINT MAY BE FILED BY DEFENDANT IN AN ACTION TO QUIET TITLE. *Winter* v. *McMillan*, 243.

6. CROSS-COMPLAINT BRINGING IN NEW PARTIES. — In an action to quiet title, the defendant may bring in new parties by cross-bill, when necessary for the complete determination of the rights of the parties. Hence where the defendant claimed that H. had been the owner of the property, and while such owner had conveyed it to plaintiff, in trust, as security from loss on account of certain contingent liabilities; that H. was still in possession of the property, but that defendant had succeeded to his interest under an execution sale, — it was held that H. might be brought in by cross-bill for the purpose of enabling the court to completely determine all the rights of all the parties, and to ascertain the extent of plaintiff's rights under the trust deed to him. *Id.*

7. A party is estopped by the allegations in his own pleading. *Knoop* v. *Kelsey*, 777.

8. DEFECT IN PLEADING CURED BY VERDICT WHEN. — A verdict will aid a defective statement of title, but will never assist a statement of a defective title or cause of action. Where there is a defect, imperfection, or omission in a pleading, either in substance or in form, which would have been a fatal objection upon demurrer, yet if the issue joined be

such as necessarily required, on the trial, proof of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give, or the jury would have given, the verdict, such defect, imperfection, or omission is cured by the verdict. *Chicago etc. R. R. Co.* v. *Hines*, 515.

See BANKS AND BANKING, 15; CORPORATIONS, 1; DURESS; ESTOPPEL, 2; FRAUD, 1-4; LIBEL AND SLANDER, 11; JUDGMENTS, 1, 16; MALICIOUS PROSECUTION, 1; MASTER AND SERVANT, 8; MINES AND MINING, 2, 5; NEW TRIAL; PARTITION, 1, 2; TRIAL, 10; TROVER.

PLEDGE.

See MORTGAGE, 2.

POLICE POWER.

See GAS COMPANIES, 2.

POWERS OF ATTORNEY.

See AGENCY, 2, 4.

PRESUMPTIONS.

See APPEAL AND ERROR, 2, 4, 9; BANKS AND BANKING, 12; CARRIERS, 26, 47; CORPORATIONS, 11; CRIMINAL LAW, 3, 4; DOWER.

PRINCIPAL AND AGENT.

See AGENCY.

PRIVILEGED COMMUNICATION.

See LIBEL AND SLANDER, 10.

PROBABLE CAUSE.

See CARRIERS, 35, 36; MALICIOUS PROSECUTION, 2-4.

PROBATE COURTS.

See APPEAL AND ERROR, 5; COURTS.

PROCESS.

1. JURISDICTION — SERVICE BY PUBLICATION. — Jurisdiction over defendant is acquired in cases of service of summons by publication only when the statutory requirements are successively and accurately taken. *Beckett* v. *Cronin*, 299.
2. JURISDICTION — ORDER FOR SERVICE BY PUBLICATION. — An order for publication of summons must be based upon an affidavit by plaintiff showing affirmatively an existing cause of action against defendant; otherwise the court acquires no jurisdiction over defendant. *Id.*
3. NOTICE TO NON-RESIDENT DEFENDANT. — Notice by publication or other substituted service, in connection with an attachment by trustee process of property owned by a non-resident, and provided by the law of the state where the property is located, is not in conflict with the Fourteenth Amendment to the constitution of the United States, and is sufficient to support a proceeding and judgment in rem. *Hagle* v. *Mott*, 106.

4. NOTICE TO NON-RESIDENT DEFENDANT. — Vermont Revised Laws, sections 1402–1404, providing for service of notice on non-resident defendants, include justices' as well as other courts. *Id.*

5. NOTICE TO NON-RESIDENT DEFENDANT in trustee process in a justice's court, in accordance with the requirements of the statute, is sufficient, and only such further proceedings are needed to reach and hold money in the hands of the trustee as would have been necessary if there had been personal service of the writ. *Id.*

6. SUMMONS — AMENDMENT. — Where a summons dated July 16th requires the defendant to appear on the first Monday in July, instead of the first Monday in August, as prayed for in the declaration, it is not void, upon the appearance of the defendant at the latter date, and may be amended on motion. *Richmond etc. R. R. Co.* v. *Benson*, 446.

See CORPORATIONS, 13.

PROMISSORY NOTES.

See NEGOTIABLE INSTRUMENTS, 1, 2, 4, 7, 8.

PROXIMATE CAUSE.

See RAILROAD COMPANIES, 7.

PUNISHMENT.

See PENALTY, 1, 2.

QUIETING TITLE.

See MORTGAGE, 6; PLEADING, 6; TRIAL, 2.

QUO WARRANTO.

See OFFICE AND OFFICERS, 1.

RAILROAD COMPANIES.

1. NEGLIGENCE — INJURY TO CHILD — EVIDENCE OF CUSTOM IN REGARD TO TURN-TABLES. — In an action against a railway company for negligently causing the death of a child in leaving a turn-table unlocked, evidence of a custom of railways to leave their turn-tables unlocked and unfastened at all times, whether in actual use or not, no matter whether inclosed or in a public place, is inadmissible on the issue as to whether or not the turn-table was secured, at the time of the injury, as careful and prudent men would ordinarily fasten it under similar circumstances. *Ihsaco R'y & Nav. Co.* v. *Hedrick*, 169.

2. NEGLIGENCE — UNFASTENED TURN-TABLE — INJURY TO CHILD. — It is the duty of a railway company to so fasten its turn-table as to prevent injury to those who, by reason of their tender years, are incapable of comprehending its dangerous character, either by locking it, or in some other way preventing access to it. A failure to take such precaution is negligence on the part of the company, for which it must respond in damages. In such case, the fact that prior to an accident the turn-table had been secured by a rope, which might be untied by children playing upon it, and in the past had proved to be an insecure fastening, will not exonerate the company from liability. *Id.*

3. DUTY OF ENGINEER. — It is the duty of a railroad engineer while running his engine to keep a careful lookout along the track, in order to

avert danger, in case he shall discover any obstruction in front of him, whether at a crossing or elsewhere. *Deans* v. *Wilmington etc. R. R. Co.*, 202.

4. NEGLIGENCE — PRESUMPTION. — RAILROAD ENGINEER who sees a human being walking along or across the track in front of his engine has a right to presume, without further information, that he is a reasonable person, and will get out of the way of harm before the engine reaches him; consequently, it is not negligence in the engineer to act on such presumption. *Id.*

5. DUTY OF ENGINEER. — When an engineer discovers, or by reasonable watchfulness may discover, a person lying upon the track asleep or drunk, or sees a human being known by him to be insane, or otherwise insensible to danger, or unable to avoid it, upon the track in front, it is his duty to resolve all doubt in favor of the preservation of life, and immediately use every available means, short of imperiling the lives of passengers on his train, to stop it. *Id.*

6. CONSTITUTIONAL LAW — KILLING STOCK — FENCES — DUE PROCESS OF LAW. — In the absence of a statute making it the duty of railroad companies to fence their tracks, a statute making such companies liable for live-stock killed by them on their unfenced tracks, without regard to their own negligence or the possible contributory negligence of the owner of the stock, is unconstitutional and void, as imposing a penalty without a wrong, and taking property without due process of law. *Oregon R'y & Nav. Co.* v. *Smalley*, 143.

7. NEGLIGENCE — PROXIMATE CAUSE — LOSS OF HORSES FROM BURNING PASTURE FENCE. — Where a railway company negligently burns a pasture fence, whereby horses escape and become lost to the owner, the company is liable to him for their value, notwithstanding its ignorance of the fact that the horses had been recently brought from a remote distance, and placed in the pasture. The destruction of the fence was the proximate cause of the loss of the horses. *St. Louis etc. R'y Co.* v. *McKinsey*, 54.

8. NEGLIGENCE — SETTING FIRE ON RIGHT OF WAY. — Where a railroad company, whose right of way as well as surrounding lands is composed of one vast bed of turf or peat, intentionally sets fire to such right of way in a season of great drought, it is guilty of positive tort, and not of mere passive negligence, and is liable for all loss resulting to adjoining owners or others to whose land the fire is communicated by an ordinary wind. *Louisville etc. R'y Co.* v. *Nitsche*, 582.

9. NEGLIGENCE — SETTING FIRE ON RIGHT OF WAY. — A railroad company may remove combustible material from its right of way, and while it may ordinarily employ fire for that purpose without committing negligence, still, when the use of fire greatly imperils adjoining property, it is a positive wrong to employ fire for such purpose, for which the company must respond in damages in case of loss. *Id.*

10. POWER OF RAILWAY COMPANY TO LOCATE STATIONS ON ITS ROAD. — A railway company cannot be compelled, on the one hand, to locate stations on its road at points where the cost of maintaining them will exceed the profits resulting therefrom to the company, nor allowed, on the other hand, to locate them so far apart as to practically deny to communities on the line of the road reasonable access to its use. *Mobile etc. R. R. Co.* v. *People*, 556.

11. RAILWAY COMPANY CANNOT BIND ITSELF BY CONTRACT TO MAINTAIN STATIONS AT PARTICULAR POINTS. — A railway company cannot bind itself

by contract with individuals to locate and maintain stations at particular points, or to not locate and maintain them at other points. The company should be left free to establish and re-establish its depots wherever the accommodation of the wants of the public may require. The power to locate stations is, from its nature, a continuing one. *Id.*

12. RAILWAY COMPANY CANNOT BE COMPELLED TO CONTINUE STATION WHEN. — A railway company cannot be compelled to maintain or continue a station at a point when the welfare of the company and of the community in general requires that it should be changed to some other point. *Id.*

See CARRIERS; CORPORATIONS, 1; JUDGMENTS AND DECREES, 19; MASTER AND SERVANT, 2–5, 7, 8; RECEIVERS, 2, 3.

RAPE.

See CRIMINAL LAW, 10.

RATIFICATION.

See DEEDS, 1; EXECUTION, 3.

REAL PROPERTY.

"OWNER," MEANING OF TERM. — The term "owner," when used alone, imports an absolute owner, or one who has complete dominion of the property owned, as the owner in fee of real property; but its meaning is varied, according to the connection in which it is used, and it is to be understood according to the subject-matter to which it relates. *McFatrv.* v. *Pierson*, 388.

See MINES AND MINING, 2.

REBATE.

See CARRIERS, 31–33.

RECEIVERS.

1. AGENT OF COURT, AND NOT OF OWNER. — A receiver is generally only the agent of the court appointing him, with authority to take possession and control of the property in litigation, and is not the representative of its owner for the fulfillment of the latter's contracts, except in cases in which he has made the contract his own by some act of adoption. *Brown* v. *Warner*, 67.

2. RECEIVER OF RAILROAD — NOT BOUND BY COMPANY'S CONTRACT. — A receiver placed in charge of a railway to hold and operate it is not bound to carry out the contract of the company with a third person to maintain a switch on the latter's land; and if the receiver discontinues the switch, the only remedy is against the company for a breach of the contract. *Id.*

3. RAILWAY AND RECEIVER. — TO SUPPORT A JUDGMENT AGAINST A RAILROAD COMPANY, in an action commenced against its receiver, and continued against the company after his discharge, the facts which make the company liable for losses while its road was in the hands of the receiver must be alleged and proved. *Texas etc. R'y Co.* v. *Adams*, 56.

See ATTACHMENT AND GARNISHMENT, 4.

RECOGNIZANCE.
See ASSIGNMENT.

REFORMATION.
See EQUITY, 1.

REGISTRATION.
See CHATTEL MORTGAGES, 4; DEEDS, 5–7.

REMAINDERS.
See DEEDS, 3.

RES JUDICATA.
See JUDGMENTS, 9–12.

RESCISSION.
See VENDOR AND PURCHASER, 6, 7, 9–11.

RESTRAINT OF TRADE.
See CONTRACTS, 4.

REVERSAL OF JUDGMENTS.
See APPEAL AND ERROR.

SALES.

1. CONDITIONAL SALE — CONSIDERATION — LOSS OF PROPERTY BEFORE PAYMENT. — An absolute promise to pay a certain sum, being the balance due upon a conditional sale of personal property under which the vendee took possession and used it in all respects as his own, the vendor retaining the title until the purchase price was paid, is based upon a sufficient consideration, and may be enforced in the event that the property is destroyed by fire without negligence on the part of the vendee before the payment of the purchase price or any default in the payment thereof. *Tufts* v. *Griffin*, 863.
2. FRAUDULENT REPRESENTATIONS BY VENDOR. — Evidence of false representations made by a vendee as to his financial standing at the time goods are delivered to him, but not relied upon by the vendor in making the delivery, under a contract that the title to them is to remain in the vendor until they are paid for or sold in due course of trade, is immaterial and inadmissible in an action of replevin by the vendor to recover the goods from a third person, who is not a purchaser in due course of trade. *Pratt* v. *Burhans*, 703.
3. RETENTION OF TITLE BY VENDOR — RIGHTS OF PURCHASERS. — A contract of sale, by which the title to goods is to remain in the vendor until paid for or sold in due course of trade by the vendee, to whom they are delivered, is valid; and a purchaser from him in due course of trade takes a good title, while others, not so purchasing, cannot rely upon his bare possession as conclusive evidence of title. *Id.*
4. VENDOR'S LIEN FOR PURCHASE-MONEY — WAIVER. — A vendor's lien for the purchase price of personal property is not waived, in the absence of an express agreement to that effect, by the taking of a note

or other personal security of the vendee for the unpaid purchase-money. An intention to waive such lien in this way must, if it exists, be stated in the complaint. *Bristol* v. *Pearson*, 900.

5. RIGHT OF STOPPAGE IN TRANSIT is a right possessed by the seller to reassume the possession of goods not paid for, while on their way to the purchaser, in case he becomes insolvent before he has acquired actual possession of them. *Kingman* v. *Denison*, 711.

6. RIGHT OF STOPPAGE IN TRANSIT is properly exercised only upon goods which are in passage, and are in the hands of some intermediate person between the seller and purchaser in process and for the purpose of delivery; and the right may be exercised, whether the insolvency of the purchaser exists at the time of sale, or occurs at any time before actual delivery of the goods without the knowledge of the seller. *Id.*

7. RIGHT OF STOPPAGE IN TRANSIT will not be defeated by an apparent sale, fraudulently made, without consideration, for the purpose of defeating the right; for there must be a purchase for value without fraud, to have this effect. *Id.*

See FRAUDULENT CONVEYANCES, 1; JUDGMENTS, 17, 18; TAXATION, 3, 4.

SCHOOLS.

See TAXATION, 5.

SCIRE FACIAS.

See SET-OFF, 2, 4.

SEPARATE PROPERTY.

See HUSBAND AND WIFE, 5, 6.

SET-OFF.

1. SET-OFF NOT ENFORCEABLE AT LAW MAY BE ALLOWED IN EQUITY. — A just account for necessaries furnished a minor for maintenance and education by the executor of her father cannot be pleaded in payment or as a set-off in a court of law to a *scire facias* to recover her portion of a recognizance entered into by the executor in the orphans' court. Such account, however, when established, may be allowed as a set-off thereto in a court of equity. *Burton* v. *Willin*, 363.

2. SET-OFF IS NOT A GOOD PLEA AT LAW TO SCIRE FACIAS upon a recognizance in the orphans' court or elsewhere. *Id.*

3. SET-OFF IS GOOD DEFENSE TO ACTION OF DEBT on a recognizance in the orphans' court. *Id.*

4. SET-OFF IS NOT GOOD DEFENSE TO SCIRE FACIAS on a recognizance in the orphans' court in an action at law, but it may be pleaded in a court of equity, where the technicalities and forms of the common law do not prevail. *Id.*

5. SET-OFF NOT PLEADABLE AS LAW, WHEN WILL BE ALLOWED IN EQUITY. — When a party has a just defense by way of set-off, but is prevented by technicality or mere form from setting it up at law, equity will arrest the career of the plaintiff at law until he allows the set-off. *Id.*

See BANKS AND BANKING, 17–19.

SHELLEY'S CASE.

See WILLS, 5, 6.

SHIPPING.

1. CONTRACT OF HIRING — RECOVERY FOR BREACH. — Where the master of a vessel engages a person to take charge of it, extinguish a fire on board, and protect the cargo, this constitutes a contract of hiring, and not an agency. The person so employed is entitled to complete his part of the contract, and if previously discharged by the owner of the vessel without cause, may recover against him for the breach of the contract. *Horan* v. *Strachan*, 471.

2. CUSTOM OF PORT, WHEN PART OF CONTRACT. — Where the master of a vessel in distress employs a person to extinguish a fire on board and protect the cargo, with knowledge of and contracting in reference to a reasonable custom of port to charge custody, commission, and attendance fees, the owner of the vessel is bound by such custom. *Id.*

3. CUSTOM OF PORT, VALIDITY OF. — A custom of port that one employed to take charge of a vessel in distress, for the purpose of saving it and its cargo, is entitled to charge a custody commission and reasonable attendance fee is not invalid because it does not fix the attendance fee in every case. *Id.*

4. COMMISSION ON DISBURSEMENTS. — One who is employed by the master of a vessel in distress to save it and its cargo is not entitled to commissions on disbursements, when such disbursements are made by somebody else, and in the absence of proof of the existence of a custom to that effect brought to the notice of the master, and that the person employed had the money for that particular purpose, or had made arrangements to procure it for such purpose, and had thereby incurred expense. *Id.*

SLANDER.

See LIBEL AND SLANDER; NEW TRIAL.

SPECIFIC PERFORMANCE.

1. PAROL CONTRACT TO CONVEY. — Possession of land by the vendee, taken with the consent of the vendor, and under a parol contract by him to convey, will take the case out of the statute of frauds, and authorize compulsory specific performance, only when the taking of possession is pursuant to and referable solely to the parol contract. *Emmel* v. *Hayes*, 769.

2. SPECIFIC PERFORMANCE — PAROL CONTRACT TO CONVEY — PART PERFORMANCE. — MERE CONTINUANCE OF POSSESSION does not constitute part performance so as to authorize specific performance of an alleged parol contract to convey land. There must be some notorious and radical change in the attitude of the contracting parties towards each other, which in itself indicates that some contract has been made between them, before parol evidence is admissible to show the details of the agreement. *Id.*

3. SPECIFIC PERFORMANCE WILL BE DECREED OF AN AGREEMENT whereby a land-owner stipulates that a ditch may be constructed on his land, that after it is constructed certain waters shall be appropriated, and that he will convey to the persons constructing the ditch one half of the waters so appropriated and of the right of way over his land for the ditch, and acting under this agreement, the other parties have entered upon the land, and constructed the ditch. *Flickinger* v. *Shaw*, 234.

4. PAROL CONTRACT TO CONVEY — IMPROVEMENTS. — One in possession of land under a parol contract to convey is not entitled to specific perform-

ance upon the ground of improvements made upon the land, when they are such only as occur in the ordinary course of husbandry. *Mansel* v. *Hayes*, 769.

See VENDOR AND PURCHASER, 7.

STATES.

1. A STATE ENTERING INTO CONTRACTS lays aside its attributes of sovereignty, and binds itself, substantially, as one of its citizens does when he enters into a contract. *Carr* v. *State*, 624.
2. CONTRACTS OF A STATE ARE INTERPRETED as the contracts of individuals are, and controlled by the same laws. *Id.*
3. A STATE HAS NO POWER TO ANNUL OR IMPAIR ITS OWN CONTRACT. Its legislature may, by failing to make an appropriation, defeat the payment of a just claim or block the wheels of government, but it has, under the constitution, no right to do so. *Id.*
4. BETWEEN A CONTRACT OF THE STATE AND ONE OF ITS CITIZENS THERE IS THIS DIFFERENCE, that the latter cannot defeat the enforcement of a contract, while the former may, because not liable to suit without its consent, and not compellable to make appropriations to provide means of payment. *Id.*
5. CREDITORS ACCEPTING OBLIGATIONS OF THE STATE ARE BOUND TO KNOW that they cannot enforce their claims against the state directly, nor against its officers, when no appropriation has been made as the constitution requires. *Id.*
6. IF NO APPROPRIATION HAS BEEN MADE TO PAY A DEBT OF A STATE, NO ACTION CAN LIE AGAINST THE OFFICERS OF THE STATE THEREOF. Unless there is an appropriation, courts have no power to enforce a contract of a state, though they do not doubt its validity. *Id.*

See APPROPRIATIONS, 1–4; INTEREST, 1–5.

STATIONS.

See RAILROAD COMPANIES, 10–12.

STATUTES.

1. PENAL STATUTE IS ONE WHICH IMPOSES A FORFEITURE OR PENALTY for transgressing its provisions, or for doing a thing prohibited. *Woolverton* v. *Taylor*, 521.
2. A STATUTE CANNOT BE CHANGED OR REPEALED BY A SUBSEQUENT ACT WHICH IS VOID because unconstitutional. An unconstitutional act can neither tear down nor build up, neither create new rights nor destroy existing ones. *Carr* v. *State*, 624.

See APPROPRIATIONS; CONTRACTS, 1, 2; CORPORATIONS, 14; EVIDENCE, 3; NEGLIGENCE, 11–13.

STATUTE OF FRAUDS.

See FRAUD, 6.

STATUTE OF LIMITATIONS.

See LIMITATIONS OF ACTIONS; MORTGAGE 4.

STOCK AND STOCKHOLDERS.

See CORPORATIONS.

STOPPAGE IN TRANSITU.

See CHATTEL MORTGAGES, 6; SALES, 5–7.

STREETS.

See MUNICIPAL CORPORATIONS, 16.

SUBROGATION.

See MORTGAGE, 9; USURY, 2.

SURETYSHIP.

1. SURETY'S LIABILITY ON ADMINISTRATOR'S BOND IS NOT TERMINATED BY HIS DEATH, but extends to the entire term of the administration. *Heckt* v. *Skaggs*, 192.
2. DEVISEE OF SURETY LIABLE TO MAKE CONTRIBUTION WHEN. — Where the liability of a deceased surety to make contribution to his co-surety is not incurred until after his estate is fully administered, and land exceeding in value the amount of his liability passes to his devisee, judgment against the latter will be rendered for the amount of the liability, to be charged as a lien upon such land. *Id.*

SURRENDER.

See LANDLORD AND TENANT, 2.

SURVEYS.

See BOUNDARIES.

TAXATION.

1. WHEN UNEQUAL AND NOT UNIFORM. — A rule by which an assessor uniformly assesses mortgages unaccompanied by other evidence of indebtedness at their par value, and the land and other property mortgaged at from one fourth to one fifth of its cash value, is in contravention of the constitutional provision that "all taxes shall be uniform, and that the assessment shall be according to the value of the property." *Andrews* v. *King County*, 136.
2. INJUNCTION TO RESTRAIN UNEQUAL TAXATION. — While equity will not interfere to correct mere mistakes or inadvertences, or to contravene or set aside the judgments of assessors or boards of equalization in relation to values, it will interfere when the officers fraudulently, capriciously, or tyrannically refuse to exercise their judgment by adopting a rule or system of valuation designed to operate unequally and to violate a fundamental principle of the constitution. *Id.*
3. PURCHASER UNDER MUNICIPAL TAX SALE, in order to maintain his title, must show that every prerequisite to the power of sale has been complied with, and such compliance must appear on the face of the proceedings. *Murphy* v. *Mayor etc.*, 345.
4. PURCHASE AT TAX SALE BY ONE CLAIMING UNDER PRIOR VOID TAX TITLE VALID WHEN. — A party who is out of possession of land, and whose only claim thereto is based upon a tax deed void on its face, may acquire a valid title by purchase at a subsequent tax sale, although the land was assessed to him. *Staley* v. *Leomans*, 231.
5. SCHOOL TAX NOT INVALIDATED BY IRREGULAR RETURN OF JUDGES OF ELECTION. — The omission of the judges of a school election to state in

their return to the county court the number of votes cast for and against the school tax assessed against the land in the district does not invalidate a sale of such land for taxes. *Id.*

See MUNICIPAL CORPORATIONS, 20.

TELEGRAPH COMPANIES.

1. NEGLIGENCE — LIABILITY TO RECEIVER OF MESSAGE. — A telegraph company is responsible for its negligence to a person to whom a message is addressed, as well as to the sender. *Young* v. *Western Union Tel. Co.*, 883.

2. NEGLIGENCE — LIABILITY FOR MENTAL SUFFERING. — In addition to nominal damages, a recovery may be had against a telegraph company for mental suffering resulting from its negligence in failing to deliver with diligence a message announcing the dangerous sickness of a relative, when the language employed in the message is reasonably sufficient to put the company on inquiry as to the relationship between such relative and the person addressed, and to apprise the company that the object of the message was to afford the receiver an opportunity to attend the relative in his last sickness, or to be present at the funeral in case of death. *Id.*

3. NEGLIGENCE — LIABILITY FOR MENTAL SUFFERING. — The failure of a telegraph company to deliver a message worded "Come in haste; your wife is at the point of death," by which the person addressed was prevented from being present at his wife's death or attending her funeral, although his residence and place of business was in the same town, within a short distance of the office of the company where the message was received, and well known to it, is gross negligence, for which the receiver is entitled to maintain an action of tort; and in addition to nominal damages, to recover actual damages, including damages for mental suffering and anguish inflicted on him by such negligence. *Id.*

TICKETS.

See CARRIERS, 8–12.

TIME.

See VENDOR AND PURCHASER, 7, 8.

TORTS.

See DAMAGES, 2.

TRESPASS.

1. MEASURE OF DAMAGES. — IF THE LESSEES OF PREMISES have acquired a hot-water privilege for use in connection with the business carried on by them, the loss of such privilege is a proper subject for compensation in an action by them against their lessor for trespass committed by him in breaking into and forcibly altering the leased premises so as to unfit them for their business. *Hawthorne* v. *Siegel*, 291.

2. MEASURE OF DAMAGES. — IN AN ACTION BY LESSEES AGAINST THEIR LESSOR for his wrongful act in entering upon the leased premises and making alterations therein, no error against him is committed by instructing the jury that the damages recoverable by plaintiffs for any loss suffered by

them which rendered their leasehold interest wholly or in part worthless, occasioned by the wrongful acts of the defendant, must be measured by the whole duration of such lease under the terms thereof, and the length of time which it had been enjoyed by them to the time of the reception of the injury, and by the value of such advantages as accrued to them under the lease, which grew directly out of their interest therein, not including anything which resulted from the loss of hot-water rights or established trade or business. *Id.*

2. MEASURE OF DAMAGES. — EXPENSES OF REMOVAL TO ANOTHER PLACE OF BUSINESS, and damages resulting from being deprived of the use of improvements abandoned by them, are proper elements of damages in an action by lessees against their lessor for his wrongful act, whereby they were compelled to abandon premises leased by them, and to remove to another place of business. *Id.*

4. LOCAL ACTION — JURISDICTION. — An action for trespass to land situated in one country or state cannot be maintained in the courts of another state. *Morris* v. *Missouri P. R'y Co.*, 17.

5. SHEDDING WATER ON ADJOINING LAND. — One who, by means of a spout, sheds and throws the water from his building upon the land of an adjoining owner is guilty of trespass, and liable in damages therefor. *Conner* v. *Woodfill*, 568.

6. EASEMENT — SHEDDING WATER ON LAND OF ANOTHER. — One who, by means of a spout, throws water from his building on the land of an adjoining owner for more than twenty years without an assertion of a right so to do, and only by sufferance of such owner, does not acquire an easement, but remains a trespasser. *Id.*

See ACTIONS, 1; MINES AND MINING, 5.

TRIAL.

1. JURY TRIAL. — ISSUES RESPECTING THE LEGAL TITLE TO LAND were triable at law at the time the constitution was adopted, and either party is therefore entitled to a jury trial thereof under the provision of the state constitution declaring that the right of trial by jury shall be secured to all, and remain inviolate. *Donahue* v. *Meister*, 283.

2. JURY TRIAL IN SUITS TO QUIET TITLE. — Under the provision of the code authorizing any person claiming title to real property to maintain an action against an adverse claimant thereof to determine their conflicting claims of title, either party is entitled to trial by jury, if the answer avers that defendant was wrongfully in possession and was ousted by the plaintiff and wrongfully kept out of possession. *Id.*

3. OFFER OF PROOF, WHEN IMPROPER. — When objection to a question has been sustained, counsel should not be allowed to state in the presence of the jury what he can or proposes to prove if allowed to do so, and it is reversible error for the court to refuse to instruct the jury to disregard such offer of proof. *McDuff* v. *Detroit etc. Co.*, 673.

4. PRODUCTION OF EVIDENCE — REMEDY. — Where a motion requiring a party to produce certain books and papers is sustained, the party is not bound to disregard the order of the trial court, suffer for the disobedience, and then seek redress by appeal. An objection made and exception reserved in proper time is all that is required to be done to present the question on appeal. *Cleveland etc. R'y Co.* v. *Closser*, 593.

5. SPECIAL FINDINGS — SUFFICIENCY OF. — Where by a special finding the substance of the issue is established, it is sufficient; and that it contains

more facts than plaintiff is required to prove does not vitiate it, provided such facts are connected with the main issue, support it, and do not establish a distinct and independent cause of action. *Id.*

6. SPECIAL FINDINGS MUST BE CONSIDERED AS A WHOLE, and cannot be dissected into fragmentary parts, and successfully assailed in detail. One part must be considered in connection with other connected parts, or parts referring to the same transaction, and if, taken as a whole, the findings legitimately support the judgment, it will be upheld. *Id.*

7. INSTRUCTIONS NOT APPROPRIATE to the issue as tendered and accepted are properly refused. *De Votie* v. *McGerr*, 426.

8. SINGLE INSTRUCTION NEED NOT CONTAIN WHOLE LAW OF CASE. — The entire law of the case need not be stated in a single instruction, but the law as applicable to particular questions or to particular parts of the case may be properly stated in separate instructions; and if there is no conflict in the law as stated in different instructions, and all the instructions, considered as a series, present the law applicable to the case fully and accurately, it is sufficient. *Chicago etc. R. R. Co.* v. *Hines*, 515.

9. CONDUCT OF COURT AND COUNSEL. — When a judge expresses an opinion on any disputed fact, or of the character of a witness, or compliments one attorney at the expense of another, or uses language which tends to bring an attorney into contempt before the jury, he commits error for which the verdict and judgment will be set aside. *McDuff* v. *Detroit etc. Co.*, 673.

10. If a party has filed an answer in bar, he cannot afterwards file an answer in abatement even by leave of the court. *Watts* v. *Sweeney*, 615.

See APPEAL AND ERROR; CRIMINAL LAW, 7–9; DEPOSITIONS; EVIDENCE, 6; NEGLIGENCE, 4.

TROVER.

PLEADING. — SHERIFF. IN AN ACTION AGAINST HIM FOR THE POSSESSION OR CONVERSION OF PROPERTY, need not anticipate the source of the plaintiff's title, nor allege that it was acquired for the purpose of hindering, delaying, or defrauding creditors. Such defense is admissible under the denial to plaintiff's title. *Mason* v. *Vestal*, 310.

TRUSTS AND TRUSTEES.

1. TRUSTEE MAY RECOVER IN EJECTMENT LANDS ATTACHED BY THE TRUST, even as against the *cestui que trust*. *Kirkpatrick* v. *Clark*, 531.

2. FRAUD. — IF A SON INDUCES HIS MOTHER TO CONVEY PROPERTY TO HIM BY PROMISING that he will hold it for the benefit of, and will convey it to, another of her sons, but intending all the time to claim the whole of it for himself, equity will declare him to be a mere trustee of the legal title for the benefit of his brother to whom he promised to convey it. *Nordholt* v. *Nordholt*, 269.

See BANKS AND BANKING, 2; EXECUTORS AND ADMINISTRATORS; INFANCY, 2; STATUTE OF LIMITATIONS, 2.

ULTRA VIRES.

See MUNICIPAL CORPORATIONS, 1–3.

USAGE.

1. CUSTOM, EFFECT OF LOCAL AND GENERAL. — When a custom is general, every person who makes a contract is presumed to know the custom, and

it enters into the contract and binds him. When, however, a custom is local, a person who resides in a foreign land, and has never been to the particular locality before, is not bound, unless he has knowledge of the custom. *Horan* v. *Strachan*, 471.

2. CUSTOM, PROOF OF. — The existence of a custom cannot be proved by the opinions of witnesses that it ought to exist. Its existence must be proved as a fact. *Id.*

See SHIPPING, 2, 3.

USURY.

1. RIGHT TO RECOVER MONEY PAID AS INTEREST, AND MEASURE OF RECOVERY. — Interest voluntarily paid upon a usurious building contract may be recovered after the contract has been executed, in the absence of a statute authorizing such recovery, and the measure of recovery is the difference between the debt with legal interest added, and with the amount of payments made, computed as partial payments upon the debt *Bazar etc. Ass'n* v. *Robinson*, 26.

2. SUBROGATION, RIGHT TO, CANNOT ARISE FROM AGREEMENT VOID FOR USURY. — There is no basis for the application of the equitable doctrine of subrogation, where the claim to such subrogation grows out of an agreement which is void by reason of usury. Where, therefore, the owner of land, to secure a valid loan, conveys it to another by a deed absolute in form, and subsequently, in order to pay off this loan, borrows money from a third person at a usurious rate of interest, and procures the former grantee to convey it to such third person by an absolute deed, such conveyance is void, and the latter grantee will not be subrogated to the rights of the former. *Tribble* v. *Nichols*, 190.

VALUE.

See EVIDENCE, 5.

VARIANCE.

See BANKS AND BANKING, 15; PLEADING, 2.

VENDOR AND PURCHASER.

1. PAROL CONTRACT TO CONVEY — WITNESS AGAINST DECEDENT. — The death of the vendor in a parol contract to convey renders the vendee incompetent to testify as to improvements made by him upon the land. *Emmel* v. *Hayes*, 769.

2. AGREEMENT FOR THE SALE OF LAND, WHEN BINDS VENDEE. — An agreement signed by both vendor and vendee, declaring that the former agreed to sell to the vendee certain property for a price designated, binds the latter to pay such price. *Preble* v. *Abrahams*, 301.

3. AGREEMENT TO SELL LAND — DESCRIPTION OF PREMISES, WHEN SUFFICIENTLY CERTAIN. — An agreement for the sale of forty acres of an eighty-acre tract at Biggs is sufficiently certain to support a decree for specific performance, when aided by evidence showing that the vendors owned an eighty-acre tract at Biggs, that Mrs. B. wished to buy the western half of such tract, and that the vendee agreed that if the vendors would sell such west half to her, he would buy the other half, and thereupon the agreement in question was executed by the parties. *Id.*

4. AGREEMENT TO SELL REAL ESTATE NEED NOT DESCRIBE THE SUBJECT-MATTER THEREOF WITH SUCH CERTAINTY that it can be ascertained by

the writing alone, or by reference to some other writing. The true rule is, that the situation of the parties and the surrounding circumstances when the contract was made can be shown by parol evidence, so that the court may be placed in the position of the parties themselves, and if then the subject-matter is identified, and the terms appear reasonably certain, it is enough. *Id.*

6. EXECUTORY CONTRACT FOR SALE OF LAND — RESCISSION — RIGHT OF VENDEE. — The right of a vendor to rescind, who has conveyed land by a deed on its face reserving a lien for the purchase-money, does not exist until the vendee is in default of payment under the contract; and prior to such time one to whom the vendee has conveyed is entitled to all the rights of his vendor, which cannot be affected by any transaction between the original vendor and his vendee after the latter has parted with his interest in the land. *Huffman* v. *Mulkey*, 71.

6. EXECUTORY CONTRACT FOR SALE OF LAND — RESCISSION — BURDEN OF PROOF. — Under an executory contract for the sale of land, the right of the vendor to rescind does not exist until the vendee is in default in payment of the purchase-money; and the burden of proof is on the vendor to show the fact giving a right to rescind, in a contest with a third person claiming to be a purchaser from the vendee before default. *Id.*

7. CONTRACTS TO CONVEY, TIME AS ESSENCE OF — SPECIFIC PERFORMANCE. — Where one holding the equity of redemption to certain land procures another to furnish money to redeem, and deeds the premises to him, obtaining from him in return an agreement to sell and convey the land to a third party upon the tender by the latter of a certain sum at any time prior to a certain date, and unless such tender is made on or before such date the agreement is to become absolutely null and void, time is of the essence of the agreement, and unless the tender is made according to its terms, and before the date mentioned therein, such third party acquires no equitable title in the land. *Sowles* v. *Hall*, 101.

8. TIME IS OF THE ESSENCE OF A CONTRACT FOR THE SALE OF LAND, when it declares that the vendor will convey at any time within sixty days from the date of the contract, on the payment of the balance of the purchase price, and that such price shall be paid within such time, otherwise "the agreement to be null and void." The tender of the balance of the purchase price after the time designated will not entitle the vendee to specific performance of the contract. *Martin* v. *Morgan*, 240.

9. OF THE RESCISSION OF A CONTRACT OF SALE for the failure of the purchaser to pay the balance of the purchase price, he is entitled to recover of the vendor all the moneys paid by him on account of the purchase, less such actual damages as may have been sustained by the vendor from the vendee's breach of contract, but such damages cannot be recouped in an action in which they are not pleaded. *Drew* v. *Pedlar*, 257.

10. CONTRACT FOR SALE OF LAND — RESCISSION. — Where the vendor under a contract for the sale of land has received part of the purchase-money from the vendee, who has taken possession under the contract, the vendor cannot rescind without notice to the vendee of his intention to do so. *Phillips* v. *Herndon*, 59.

11. CONTRACT FOR SALE OF LAND — WAIVER OF RIGHT OF RESCISSION. — Where a vendor under an executory contract for the sale of land has received payments from the vendee after default in failing to pay the purchase-money notes at maturity, he thereby waives his right of rescission. *Id.*

12. BREACH OF CONTRACT TO CONVEY LAND — MEASURE OF DAMAGES. — Where a vendor, under a contract to convey land, has voluntarily conveyed it to an innocent third person before the expiration of the contract, the measure of damages against the vendor and in favor of the vendee under the contract upon payment of the purchase price is the value of the land at the time it was conveyed to such third person. *Id.*

13. LIQUIDATED DAMAGES ON FAILURE TO COMPLETE PURCHASE. — A contract for a sale, stipulating that in the event of the vendee's failure to pay the balance of the purchase price, the amount paid by him shall be regarded as liquidated damages for his breach of the contract, and retained by the vendor, is void in so far as it undertakes to fix such damages, and the vendee may therefore recover the amount paid by him, less the actual damages resulting from his non-compliance with his contract. *Drew* v. *Pedlar*, 257.

14. DAMAGES CAUSED BY A BREACH OF AN AGREEMENT TO PURCHASE REAL PROPERTY are, by the code of California, deemed to be the excess, if any, of the amount which would have become due to the seller under the contract over the value of the property to him; and an agreement stipulating that a different sum shall be considered as liquidated damages for such breach is void. *Id.*

15. DEMAND, WHEN UNNECESSARY. — IF A VENDOR ELECTS to treat a contract to purchase property of him as rescinded for the failure of the vendee to pay the balance of the purchase price, it becomes his duty to refund all money received under the contract in excess of the damages arising from its breach, and no demand need precede a suit by the vendee to recover such money. *Id.*

16. VENDOR'S LIEN IS NOT THE RESULT OF ANY AGREEMENT OR INTENTION of the vendor and vendee, but is simply an equity raised by the courts for the benefit of the former. *Avery* v. *Clark*, 272.

17. VENDOR'S LIEN IS LOST BY TAKING A MORTGAGE to secure the payment of the purchase price, in the absence of an express agreement that the vendor shall not thereby lose his right to resort to his vendor's lien. *Id.*

18. VENDOR'S LIEN IS NOT ASSIGNABLE. *Id.*

19. VENDOR'S LIEN AND MORTGAGE FOR PURCHASE-MONEY. — When a vendor parts with title, and takes a mortgage to secure the payment of the purchase-money, in which is inserted a statement that it is given "in part payment of the purchase-money of the within secured property," these words do not preserve the pre-existing vendor's lien nor extend the lien of the mortgage by relation back to the date of the contract of sale. *Id.*

20. VENDOR'S LIEN EXPIRES WHEN DEBT IS BARRED. — The lien of a vendor of land reserved in the face of the deed expires when the debt is barred by the statute of limitations. *Chase* v. *Cartright*, 207.

See FRAUDULENT CONVEYANCES, 2-6.

VENUE.

See CONTEMPT, 3.

VERDICT.

See PLEADING, 3.

WAIVER.

See CARRIERS, 34; INSURANCE, 1, 10, 11; SALES, 4; VENDOR AND PURCHASER, 11.

WARRANTY.

See INSURANCE, 5-7.

WATERCOURSES.

1. TEST OF NAVIGABILITY OF RIVER. — The test of the navigability of a river is its use as a navigable stream, or its capability of being used as such. *St. Louis etc. R'y Co.* v. *Ramsey*, 195.
2. RIPARIAN OWNER ON NAVIGABLE RIVER TAKES TO HIGH-WATER MARK ONLY. — A riparian owner on a navigable stream who derives his title from the government of the United States takes to high-water mark only, and not to the middle of the stream. *Id.*
3. HIGH-WATER MARK, HOW DETERMINED. — The line of high-water mark of a stream is to be found by examining the bed and banks, and ascertaining where the presence and action of water are so common and usual, and so long continued in all ordinary years, as to mark upon the soil of the bed a character distinct from that of the banks, in respect to vegetation, as well as in respect to the nature of the soil itself. *Id.*
4. ACCRETION AND ALLUVION, DEFINITIONS OF. — Accretion is the increase of real estate by the addition of portions of soil by gradual deposition through the operation of natural causes to that already in the possession of the owner. Alluvion is the term applied to the deposit itself, while accretion denotes the act. *Id.*
5. GRAVEL BAR IN NAVIGABLE RIVER IS NOT ALLUVION WHEN. — A gravel bar in the bed of a navigable river, over which steamboats can pass in ordinary high water, and on which no trees or soil grow, is not alluvion added to the land of the riparian owner. *Id.*

See ACTIONS, 1; EMINENT DOMAIN, 1; INJUNCTIONS, 1; MILLS AND MILL-DAMS.

WIDOWS.

See DOWER; HOMESTEAD.

WILLS.

1. HUSBAND AND WIFE — ANTENUPTIAL CONTRACT, WHEN NOT TESTAMENTARY. — An antenuptial contract by which the intended husband binds himself and executors that for and in consideration of the marriage to be solemnized, his executors upon his death shall pay to his prospective wife a certain sum, to be her full and distributive share in his estate, and she binds herself to abide by the terms of the contract, is an absolute and irrevocable contract, equally binding upon both husband and wife, barring her claim for dower, and enforceable by her against her husband's executor. *Huguley* v. *Lanier*, 487.
2. CONTRACT, WHEN NOT TESTAMENTARY IN CHARACTER. — A contract does not take on a testamentary character because its performance is postponed until after the death of the maker and devolves upon his representatives. *Id.*
3. CONTRACT TO MAKE A WILL MAY BE ENFORCED, and if not performed, a recovery may be had for its violation. *Id.*
4. AS TO THE INTEREST OF A PRETERMITTED HEIR, his ancestor must be regarded as dying intestate. *Smith* v. *Olmstead*, 336.
5. PRETERMITTED HEIR. — A POWER OF SALE IN A WILL, and a sale made thereunder, though confirmed by a court, do not affect the share

of a pretermitted heir, when the sale was not made to pay decedent's debts, nor charges accruing in the course of administration. This rule is not abrogated by a statute declaring that when an authority is given in a will to sell property the executor may sell any property of the estate without an order of the court, but that no title passes until the sale is confirmed by the court. *Id.*

6. RULE IN SHELLEY'S CASE DOES NOT APPLY WHERE it unequivocally appears that the persons who are to take are not to take as heirs of the grantee or devisee. *Earnhart* v. *Earnhart*, 652.

7. SHELLEY'S CASE. — A devise of property to E. for and during the term of his natural life, and at his death to the persons who would have inherited the same if E. had owned the same in fee-simple at the time of his death, but declaring that there shall vest in E. a life estate, and nothing more, does not vest the fee in E., but gives him a life estate only. *Id.*

See DOWER; EXECUTORS AND ADMINISTRATORS; HOMESTEAD, 2-5.

WITNESSES.

1. ARCHITECT MAY TESTIFY AS TO TIME IN WHICH BUILDING COULD BE REBUILT without dangerous haste. *Chamberlain* v. *Dunlop*, 807.

2. OPINION AS EVIDENCE. — In an action to recover damages from a railroad company for injury to property from passing trains, an inquiry of a witness as "to what amount, if any, is your property depreciated in market value by reason of the construction and operation of defendant's railroad, taking into consideration the physical disturbances to said property only, if any, such as noise, smoke, noxious vapors, and vibrations, and excluding from your consideration all damages and inconvenience sustained in common with the community at large," is objectionable, as calling for an opinion upon a matter involving a mixed question of law and fact. *Gainesville etc. R'y Co.* v. *Hall*, 42.

3. NEGLIGENCE — INJURY TO CHILD FROM UNLOCKED TURN-TABLE. — In an action against a railway company for negligently causing the death of a child in leaving its turn-table unfastened, expert medical testimony that the child was frail and weak, and that he died from the injury received at the turn-table, is admissible on the issue as to his health and physical condition at the time of the injury; but such testimony as to "whether or not, if the child had been a healthy child, it would have survived the injury" is inadmissible under such issue. *Ilwaco R'y & Nav. Co.* v. *Hedrick*, 169.

4. EVIDENCE — DECLARATIONS OF AGENT. — A witness who has testified to certain declarations made by an agent during the term of his agency cannot be permitted, on cross-examination, to testify to contrary declarations made by such agent after the expiration of his agency. *Cushman* v. *Somers*, 92.

5. WITNESS — PRIOR. — Evidence that a witness, long prior to the trial, made statements consistent with his testimony is not admissible when he has been impeached by evidence of his bad reputation, to rebut the effect of such impeaching evidence. *Mason* v. *Vestal*, 310.

See APPEAL AND ERROR, 11; LANDLORD AND TENANT, 3; VENDOR AND PURCHASER, 1.

8851